

THE CONSTITUTION OF KENYA

CONTEMPORARY READINGS

**PLO LUMUMBA
M. K. MBONDENYI
S. O. ODERO**

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OF KENYA:
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Editors

M. K. Mbondenyi

P. L. O. Lumumba

Steve O. Odero

lawAfrica

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LawAfrica Publishing (U) Ltd
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DEDICATION

This book is dedicated to the memory of the late Professor H.W.O Okoth-Ogendo for his robust contribution to the development of constitutional law in Kenya.

FOREWORD

The post-independence Africa has witnessed a plethora of difficulties, more particularly in the areas of good governance, the rule of law, accountability, and openness. At the centre of these endemic systemic problems has been lack of transformative leadership at all the echelons of power, committed to the development and institutionalisation of viable constitutions amenable for constitutionalism. Historically, this anomaly has led to the usurpation of the power of the state by the leaders, overshadowing the cardinal responsibility of the state to protect the citizens against authoritarian and dictatorial regimes. Suffice it to say, this undermined the age old doctrine of *ubi societas ibi ius* (where there is society, there is law), particularly in relation to lack of adherence to, *inter alia*, the rule of law, human rights, good governance, and accountability in Africa. Over the last five decades, Africans, Kenyans included, have continued to advocate for people-driven constitutional change and the establishment of legitimate multiparty participatory democratic systems capable of upholding and promoting constitutionalism.

The Constitution of Kenya: Contemporary Reading, which contains chapters written by legal experts, some of whom are renowned scholars, is a timely and a pioneering volume, particularly following the promulgation of the new Constitution of Kenya in 2010. The new Constitutional dispensation has ushered in a new epoch in Kenya replete with uncertainties and potential challenges. The chapters take the legal regime debate to a new level, by examining in a holistic perspective, the nexus between the critical issue areas and the new constitution. In this context, constitutionalism, the Bill of Rights, gender equity, land and environment, separation of powers, devolved government, constitutional regulation of international law, and constitution implementation and their inherent interlocking linkages are used as points for departure in the book to assess the emerging legal regime in Kenya. The chapter contributors analyse the opportunities that exist following the promulgation of the new constitution as well as the potential challenges derived therefrom. The chapters, particularly Chapter One, reminds us of the daunting task the advocates for constitutional change faced prior to the promulgation of the new constitution.

The operationalisation of any new constitution is a gradual process and has its own dynamics, which if not carefully guided may be undermined by forces determined to maintain the *status quo ante*. This book is centred on the premise that the new constitution has laid the groundwork for constitutionalism, which in many respects has paved the way for the possibilities for positive and meaningful operationalisation of issue areas beneficial to Kenyans.

The chapters are not necessarily ends in themselves, but rather have opened up debate on new vistas that should be unpacked in the ongoing voyage as Kenya continues on its transitional path from the *ancien* to the new constitutional legal regime. More specifically, the chapter contributors remind us that as the new constitutional dispensation takes root in reshaping and recasting Kenya's genealogical trajectory, new parameters loaded with centrifugal and centripetal forces, let alone the old ones, are bound to emerge in the process. In a country where the culture of impunity is deeply entrenched; where corruption is institutionalised; where the political parties are not policy-cum-ideology-driven; where the youth have lost touch with democratic values and allow themselves to be used by politicians under the pretext of poverty and unemployment; and where the doctrine of the separation of powers is blurred in favour of the executive, the challenges facing the constitution implementation process are real and complex. I commend the editors of the book and the chapter contributors for their courage in laying the groundwork for debate on the new constitution and the emerging constitutionalism in Kenya.*

* **Korwa Gombe Adar** is Professor of International Relations, United States International University, Nairobi, Kenya.

PREFACE

The Constitution of Kenya: Contemporary Readings is the first major attempt by some of Kenya's leading scholars to capture both the historical and legal aspects of the Constitution of Kenya that was promulgated on 27 August 2010. The origin of Kenya's constitutional order can closely be linked with the declaration of the British East Africa Protectorate of 1895. Prior to this period, the country had no formal legal system or government as recognised today. However, like every other pre-colonial African society, the traditional communities that lived in the territory, now called Kenya, had peculiar forms of socio-political arrangements that could loosely be termed "government."

The declaration of protectorate status vested authority on Britain to govern the territory that had all along been occupied by indigenous communities with distinct socio-political traits. Faced with such a challenge, the colonialists needed to establish a workable system of government. Such a government would only be tenable with the help of a sound legal system and an all-encompassing constitutional order. The pre-independence period therefore experienced what may be loosely termed as 'constitutional experimentation', that saw the country move from the Lyttleton Constitution, Lennox-Boyd Constitution to the Macleod Constitution.

In February 1962, the Second Lancaster House Constitutional Conference was held, resulting in an agreement on a firm framework for a new constitution that would usher the country into independence. This constitution later formed the basis of the Independence Constitution. The final pre-independence constitutional negotiations were held in 1963, during which an agreement was reached for internal self-government on 1 June 1963 and full independence six months later. Negotiations for the Independence Constitution commenced soon after the establishment of the internal self-government and climaxed in the final constitutional conference later that year. The Independence Constitution was agreed upon without much difficulty and with minimum changes to the previous one.

Ironically, a practice of frequent constitutional amendments started shortly after Kenya attained her independence on 12 December 1963. Consequently, the country has witnessed a

confusion of systems of governance, ranging from single-party autocracy to virtual multi-party democracy, which served to endorse the chronic culture of poor governance and human rights violations. In the process of such experimentation, Kenyans were unabatedly denied the enjoyment of many of their fundamental rights and freedoms, leading to the agitation for comprehensive constitutional reforms from the early 1990s and subsequently the demand for a new Constitution altogether.

The promulgation of the new Constitution was therefore clearly an endorsement of the fact that the imperatives of a constitutional order that is sensitive to the country's diversity cannot be ignored. On the face of it, the Constitution appears to emphasise Kenya's desperate need of a "watertight" system of governance that would ensure greater citizens' participation and promote accountability and transparency in public affairs. The system contemplated here is one that would provide equal opportunities for all citizens by creating conditions that would encourage their input in governance and development. Secondly, it should provide for the effective transfer of power and periodic renewal of political leadership through representative and competitive elections. Thirdly, the system should strengthen legislative and administrative institutions, such as Parliament, the judiciary and other state institutions. Fourthly, it should empower citizens to hold public officials accountable for their conduct, omissions and decisions. Fifthly, it should ensure effective public sector management, stable economic policies, effective resource mobilisation and efficient use of public resources. Lastly, it should adhere to the rule of law in a manner that would protect human rights and democracy and ensure equal access to justice for all. Indeed, these attributes are the hallmark of the new Constitution.

The aim of this book is to describe the historical origins and the key attributes of the country's new constitutional order. Like the constitutional history of the country, the book itself is a scholarly journey, cutting through both the historical and legal aspects of the new Constitution. Hopefully, it marks the beginning, and not the end, of a series of robust academic debates on Kenya's evolving constitutional and administrative law. For all purposes and intents, the publication is only an initial step towards concretising the understanding of the many facets of the new Constitution.

CONTRIBUTORS

Dennis Ben Mosota is a Kenyan Advocate based in Nairobi. He holds a Bachelor of Laws degree (LLB) from Makerere University and a diploma in Law from the Kenya School of Law. Additionally, he holds a Certificate in Advanced Trial Advocacy from the National Institute of Trial Advocacy (NITA, USA). Although his areas of practice and interest are on diverse branches of law, Mosota is particularly conversant and passionate about tax law advisory, foreign direct investment advisory, product liability litigation, legal due diligence and audit, labour relations, and immigration. He is also keen on public interest litigation particularly in the field of basic human rights. In addition to the practice of law, Mosota is an Associate Editor of *The Nairobi Law Monthly*.

Elisha Ongoya holds a Master of Laws (LLM) degree from the University of Nairobi with a specialisation in Law Governance and Democracy. He is a legal practitioner with vast experience in Constitutional and Administrative Law. He practices law in the firm of Asiema and Company Advocates. He also teaches Civil Litigation at the Kenya School of Law's Advocates Training Programme and was recently appointed lecturer of Constitutional Law at the Kabarak University. He has authored print and electronic journal articles in the area of constitutional and administrative law as well as institutional reform.

Luis Franceschi holds an LLB from Andres Bello University, Venezuela and an LLM from the University of Nairobi. He is currently a Doctor of Laws (LLD) candidate at the University of Navarre, Spain. Franceschi is Chairperson of the Scientific Committee of the Annual Ethics Conferences, Vice-Chairperson of Imara Educational Foundation, Legal Advisor of Strathmore Educational Trust and member of the National Values Committee at the National Economic and Social Council, Office of the President. He is a member of the African Network of Constitutional Lawyers. He has been a UNEP Governing Council Delegate and Legal Advisor to the President of the Governing Council, UNEP. He was also Country Representative at the 4th and the 7th Global Training Program on Environmental Law & Policy (United Nations Environment Program— 1999 and 2005 respectively). Franceschi

has co-authored and edited several books and articles in refereed journals.

Mathews Okoth holds an LLB degree from Moi University. In addition, he holds a Diploma in Law (cum laude) from the Kenya School of Law. Okoth has extensively researched in areas of land and environment, public law and policy and constitutional law. He was part of the team that undertook a study and compiled a report on Gender Based Violence in Kenya following the post-election violence. He has co-published several articles on Land Law and Land Reform. Currently, Okoth is an associate at Mohammed and Muigai Advocates.

Maurice Oduor is a holder of an LLB degree from Moi University and an LLM in International & Comparative Law from the University of Pittsburgh. He is a lecturer in Law and the Head of Department of Legal Aid Clinics & Externships at Moi University School of Law where he teaches various courses. Oduor has been an advocate of the High Court of Kenya since 2003. He has researched and published expansively on various legal topics including gender, social rights, human rights, law and society, legal academics and property law. He has held consultancies on, among others, gender, land and natural resources law and health law.

Morris Kiwinda Mbondenyei is the head of the Africa Nazarene University Law School. He holds an LLD and LLM degrees from the University of South Africa (UNISA), and an LLB degree from Moi University. He has extensive experience in legal research, lecturing and consulting. He has consulted with, researched and worked for a number of organisations in Africa, including the Truth, Justice and Reconciliation Commission (TJRC), International Commission of Jurists, University of the Witwatersrand Law School (Johannesburg, South Africa), the United Nations International Criminal Tribunal for Rwanda (UN-ICTR, Arusha Tanzania), Johannesburg United Institute of Education, Foundation for Human Rights, South African Human Rights Commission and Arise Africa Consultants. He has contributed to academia through numerous academic publications (books and refereed journals) and presentation of papers in both local and international conferences and seminars. He has also acted as a peer-reviewer for the *South African Journal of Human Rights* and the *African Journal of Human Rights*. Mbondenyei is a member of professional organisations including the Global Alliance for Justice

Education (GAJE), African Network of Constitutional Lawyers (ANCL) and the International Commission of Jurists—Kenya Chapter.

PLO Lumumba, an Associate Professor of public law, is the Director of Kenya Anti-Corruption Commission (KACC) and the Founding and Senior Partner at the Law Firm of Lumumba & Lumumba Advocates. He holds LLB and LLM degrees from the University of Nairobi and a PhD in Law from the University of Ghent in Belgium. He has trained in Human Rights at the Institute of Advanced Legal Studies, University of London and in International Humanitarian Law under the International Committee of the Red Cross in Geneva. He has also consulted for the UNDP on the Somalia Constitutional Process and for Zambia Centre for Multi-Party Democracy. Besides being the Founding Dean of the Kabarak University School of Law, Lumumba previously lectured for seventeen years at the University of Nairobi Law School. Lumumba is an Advocate of the High Courts of Kenya and Tanzania and a Chartered Public Secretary with the Institute of Certified Public Secretaries (ICPSK). He is recognised by the American Biographical Institute and Marquis 'Who is Who in the World'. In addition to serving as Secretary for the Constitution of Kenya Review Commission (CKRC), Lumumba also served in, among others, the National Committee on the implementation of International Humanitarian Law Task Force, Press Law Task Force and HIV and AIDS Law Task Force. He has published a number of books and refereed articles both in Kenya and elsewhere. He is also a member of several professional bodies, including the Law Society of Kenya, International Commission of Jurists (ICJ), International Bar Association (IBA), Institute of Commonwealth Studies (ICS), African Network for Prevention and Protection Against Child Abuse and Neglect (ANPPCAN), Academic Council on the United Nations Systems (ACUNS), Kenya Scouts Association (KSA), Young Men Christian Association (YMCA), Godown Arts Centre, East African Lawyers Association (EALA), Movement for Dialogue & Non-Violence (MODAN), Institute of Education in Democracy (IED) and Kenya Institute of Management (KIM).

Ruth Aura Odhiambo is a lawyer with more than 16 years of experience in international law and development, 13 of which have been focused on gender, law and human rights as well as HIV/AIDS. She holds a Masters degree in Policy Studies from University of Fort Hare, LLM from the University of Zimbabwe and LLB

from the University of Nairobi. Odhiambo is currently a lecturer at Egerton University's Institute of Women, Gender and Development Studies. She is the Coordinator Academic and Research at the Institute of Women, Gender and Development Studies. Odhiambo has taught at the University of Nairobi School of Law, as a researcher and lecturer for gender and law (women in the legal process) and labour law. As a gender specialist and consultant on women's human rights she has consulted and undertaken research for a number of organisations, including the African Union Commission (AUC), Addis Ababa, ARD Inc. based in Washington DC, Africa Medical Research Foundation-Kenya (AMREF), Agency for Co-operation and Research Development (ACORD), and Family Health International (USAID). She has also consulted and undertaken research for National Commission on Gender and Development, National Council of Science and Technology, UNICEF/UNFPA and the Government of Kenya on various gender, policy development, and HIV/AIDS, law and human rights issues. Odhiambo has served as a council member of FIDA-Kenya and currently is the co-Chairperson of South Rift Gender Based Violence (GBV) Network. She is also a council member of National Council for Science and Technology and committee member of UNESCO Regional Bioethics Management Committee.

Steve Odero Ouma is a PhD holder at University of Rome, Luiss Guido Carli. He holds an LLM degree from the University of Pretoria in South Africa and an LLB from University of Nairobi. Ouma is currently a part-time lecturer at Africa Nazarene University Law School and the University of Pretoria in South Africa. He has worked with the Kenya National Council for Law reporting and has served as a researcher with Amnesty International office in New York. He has also been a Research Associate with Institute for Diplomacy and International Studies at University of Nairobi. He has also prolifically published in a series of journals on philosophy.

Tom Ojienda holds an LLB degree from the University of Nairobi, an LLM degree from Kings College, London and an LLD from UNISA. A chevening legal scholar, Ojienda is an experienced litigation lawyer with competencies in the areas of Land Law, Constitutional Law, Environmental Law, Gender, Human Rights and International Law. He is a Senior Lecturer at the School of Law, Moi University and currently serves as a Commissioner with the Truth Justice and Reconciliation Commission. He has served as the

President of the East Africa law Society, the Chairman of the Law Society of Kenya, the Vice – President of the Pan African lawyers Union and as a member of the Council of the International Bar Association. In the year 2009 he was appointed to the Eminent Panel of international lawyers to study the legal system in the Democratic Republic of Congo and make recommendations on good governance. He also served as SUR Focal Point for East Africa. He has served as the Chairman of the Land Acquisition Compensation Tribunal (LACT), a member of the National Environment Tribunal (NET) and the Legal and Technical Committee of the National Land Policy Formulation Process. Besides several articles in refereed journals, he has authored several books. Ojienda has served as a consultant for the Njonjo Commission on inquiring into the land system in Kenya, the Ndungu Commission on illegal and irregular allotment of land, National Task Force on HIV/AIDS, World Bank, ACCORD, USAID, East African Community and the SADC. He has also served a Board Member of the American Biographical Institute, the Council of Legal Education and the Kenya Industrial Property Institute.

Victor Odhiambo is a lawyer and consultant in the area of human rights and international development. He teaches as a part-time lecturer at the Catholic University of Eastern Africa and Presbyterian University of East Africa. Odhiambo holds an LLM degree in International and Comparative Law from Southern Methodist University, USA and an LLB from Moi University, Kenya. He has worked in both Kenya and Southern Sudan and in the latter, has been helping with the capacity building efforts of the country's justice system within the context of reinforcing human rights and rule of law. He has researched extensively and published widely on various aspects of human rights.

LIST OF ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACJ	African Court of Justice
ACRWC	African Charter on the Rights and Welfare of the Child
AEC	African Economic Community
AHRLJ	African Human Rights Law Journal
AHSG	Assembly of Heads of States and Government
AIDS	Acquired Immune Deficiency Syndrome
AJIL	African Journal of International Law
AM J	American Journal
ANC	African National Congress
APRM	African Peer Review Mechanism
ART	Article
AU	African Union
CAAU	Constitutive Act of the African Union
CAT	Convention Against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
COMESA	Common Market for Eastern and Southern Africa
DC	District Commissioner
DEVAW	Declaration on the Elimination of Violence Against Women
DP	Democratic Party
DRC	Democratic Republic of Congo

ECHR	European Convention on Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
ED(S)	Editor(s)
ESC	European Social Charter
EU	European Union
FGM	Female Genital Mutilation
GA	General Assembly
GA. Res.	General Assembly Resolution
GDP	Gross Domestic Product
GPT	Graduated Personal Tax
HPs	Harmful Practices
HRC	UN Human Rights Committee
IACHR	Inter-American Convention on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Covenant on the Elimination of all forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IGAD	Intergovernmental Authority for Development
IHRR	International Human Rights Report
ILM	International Legal Material
ILO	International Labour Organisation

IMF	International Monetary Foundation
INTL	International Law
KHBS	Kenya Household Budget Survey
LGA	Local Government Act Cap 265 of the Laws of Kenya
LGC	Local Government Commission
LJ	Law Journal
LLB	Bachelor of Laws
LLD	Doctor of Laws
LLM	Master of Laws
LNC	Local Native Council
MAP	Millennium Africa Recovery Plan
MDC	Movement for Democratic Change
MDGs	Millennium Development Goals
MOU	Memorandum of Understanding
NEPAD	New Partnership for Africa's Development
NGC	National Governing Council
NGO	Non-Governmental Organisation
OAS	Organisation of American States
OAU	Organisation of African Unity
ODM	Orange Democratic Movement
OSCE	Organisation for Security and Co-operation in Europe
OSIWA	Open Society Initiative for West African
P	Page
PARA	Paragraph
PC	Provincial Commissioners
PCIJ	Permanent Court of International Justice

PNU	Party of National Unity
POA	Programme of Action
PP	Pages
PRS	Permanent Representative Committee
RECs	Regional Economic Communities
RSA	Republic of South Africa
SA	South Africa
SADC	Southern African Development Community
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SAP	Structural Adjustment Programme
SAPL	South African Public Law
SAYIL	South African Year Book of International Law
SCSL	Special Court for Sierra Leone
STCs	Specialised Technical Committees
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
UMA	<i>Union du Maghreb Arabe</i>
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific, and Cultural Organisation
UNGA	United Nations General Assembly
UNHCR	United Nations High Commission for Refugees
UNICEF	United Nations Children's Fund
UNISA	University of South Africa

UNISWA	University of Swaziland
UNP.	Unpublished
UNTS	United Nations Treaty Series
US/USA	United States/ United States of America
USSR	Union of Soviet Socialist Republic
V	Versus
VOL	Volume
WILDAF	Women in Law and Development in Africa
ZANU-PF	Zimbabwe African National Union-Patriotic Front

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INTRODUCTION

MORRIS KIWINDA MBONDENYI*

Kenya's constitutional history is an excellent case study of the myriad difficulties that most post-colonial African states have faced and continue to face in the process of self-discovery. The underlying theme in the country's constitutional history has been the question of how to establish a constitutional regime that can guarantee everyone equal participation in the nation's economic, social and political activities. This is because, since independence, Kenya's Constitution has been the government's handmaiden for undemocratic practices such as ethnic polarisation, electoral malpractices and uneven access to public resources. For more than four decades, the country prided itself in a Constitution drafted at independence in 1963 and a legal system aped from its former coloniser— Britain.

Although the Independence Constitution (now repealed) came with a flowery package of guarantees, it failed to address certain crucial issues of national importance, which later became a big threat to democracy and good governance.¹ Some of the unresolved issues included the question of streamlining the three arms of government— executive, legislature and judiciary; land acquisition and distribution; reform of the electoral system; and improving ethnic integration. The weaknesses in the Constitution undermined national integration in a number of ways. First, it propagated ethnocentrism, which now transpires throughout the country's socio-political substratum. Secondly, because of vested ethnic interests, Presidential power was personalised. These two factors have over the decades posed great challenges to constitutionalism, democracy and good governance.

* LLD, LLM (University of South Africa); LLB, Moi University. Dr. Morris Kiwinda Mbondenayi is the Head, Africa Nazarene University Law School, Nairobi, Kenya. He is also a researcher and consultant on international human rights law.

1 See the Constitution of the Republic of Kenya, adopted in 1963, as amended in 1999 (now repealed).

Good governance is influenced by the existence of a well-crafted, democratic Constitution that enables the government to manage the affairs of the state effectively, while at the same time empowering the citizenry to participate in government.² Citizens must participate in the drafting and implementation of such a Constitution. Unfortunately, the repealed Constitution was written without much input from the citizens of Kenya. Although the document was amended severally, some of the amendments eventually undermined its legal sanctity, rendering it more like a powerful tool in the hands of the executive than an agreement between the government and its citizens. A closer look at some of its provisions would confirm this position.

The repealed Constitution empowered the President to be the Head of State and Commander-in-Chief of the Armed Forces of the Republic.³ Additionally, the President could hire and fire the Vice-President and Cabinet Ministers⁴; enjoyed immunity from criminal and civil proceedings⁵; appointed Permanent Secretaries⁶, the Attorney-General⁷, the Chief Justice and other Judges⁸, the Controller and Auditor General⁹, Commissioner of Police¹⁰ and Chief of General Staff of the Armed Forces of the Republic.¹¹ Moreover, he or she could summon, prorogue and dissolve parliament at whims¹²; assented to legislation before it become law¹³ and unilaterally appointed members of the Electoral Commission.¹⁴

2 African Peer Review Mechanism 'Country Review Report of the Republic of Kenya' available at http://www.polity.org.za/article.php?a_id=99422 and <http://www.nepad.org/aprm> (accessed on 4 January 2011) 16.

3 See s 4 of the Constitution of the Republic of Kenya (now repealed).

4 As above s 15 & 16.

5 As above s 14.

6 As above s 111.

7 As above s 109.

8 As above s 61.

9 As above s 110.

10 As above s 108.

11 As above.

12 As above s 59.

13 As above s 46(2).

14 As above s 41.

It is clear that apart from vesting enormous powers on the presidency, the repealed Constitution also granted the institution overwhelming influence over the executive, judicial and legislative functions of government. As correctly emphasised in the African Peer Review Mechanism report on Kenya:

The subordination of Parliament to the Executive in law making and parliamentary oversight functions; the failure of the Executive to heed to Parliamentary recommendations; Executive interference in appointments to the Judiciary, do not conform to the accepted norms of democracy and are a source of disquiet in certain segments of Kenyan society. The traditional democratic notion of checks and balances is seen as a safety net that can best ensure that government organs work in a perfect equilibrium to deliver to the citizen an acceptable governance package.¹⁵

Democracy, strictly so called, was therefore not tenable in Kenya, much due to an 'authoritarian Constitution' that vested enormous powers on the presidency. Disquiet with the overly-amended Constitution, therefore, coupled with detest for the abuse of executive powers by incumbents, led to the agitation for constitutional reforms. It was strongly believed that only comprehensive constitutional reforms could ensure separation of powers and bring to an end the abuse of executive powers.

Constitutional reform became a central talking point for decades, leading to the promulgation of a new Constitution on 27 August 2010. The process leading to the promulgation of the new Constitution was not easy, as at some point it became bloody and violent. For example, the period between 1982 and 1988 was characterised by strong opposition to political and intellectual monolithism. The so-called 'political dissidents' challenged the dominant political discourse on self-aggrandisement and power. This intense political pressure led to the repeal of section 2A of the former Constitution in 1991, paving the way for multiparty politics.

The repeal of section 2A of the former Constitution was just but one step in the right direction as there was still in existence a matrix of laws that undermined liberal principles necessary for

15 African Peer Review Mechanism (n 2 above) 50.

a functional multi-party system. These laws included restrictions on free assembly, sedition laws, and party registration mechanisms controlled by the executive.¹⁶

The constitutional reform agenda started in earnest in 1994 with the publication of the Model Constitution by the Citizens' Coalition for Constitutional Change (4Cs), which took the mantle of pressing for constitutional change following the problematic elections of 1992.¹⁷ Apart from the repeal of section 2A and the 1997 Inter-Parliamentary Parties Group (IPPG) reforms, all of the amendments to the former Constitution restricted the liberties of individuals and groups, while enhancing the power of the executive at the expense of Parliament.¹⁸

The momentum started by the 4Cs and related groups gained ground in 1997 when the National Convention Assembly (NCA) and its executive arm, the National Convention Executive Committee (NCEC) began to mobilise for comprehensive constitutional changes before the country's 1997 General Elections. With the support of opposition political parties, the NCEC threatened to derail the 1997 elections with mass demonstrations and enlisted politicians to a boycott under the battle cry 'no reforms, no elections.' As a result, the government was forced to accede to a set of minimum reforms—the so-called IPPG reforms—that allowed elections to take place with most opposition leaders taking part.¹⁹

The most significant reform plank was the passage of legislation enabling a comprehensive review of the Constitution after the 1997 elections. However, even before the formal review was to start, the process proposed in the Constitution of Kenya Review Act²⁰

16 Institute of Education in Democracy *Election Handbook* (1997).

17 J Barkan 'Kenya: Lessons from a flawed election' (1993) 4 *Journal of Democracy* 85-99.

18 S Ndegwa 'The incomplete transition: The constitutional and electoral context in Kenya' (1998) 45 *Africa Today* 193-212.

19 As above.

20 According to the Constitution of Kenya Review Act 1997, a Constitution of Kenya Review Commission consisting of 29 commissioners was to be appointed by the president from a list of 45 submitted by various stakeholders. This commission would collect and collate the views of Kenyans by travelling across the country holding public hearings. The Act delineated three stages for the establishment of the commission but made no mention of how it would actually work.

became highly contentious and consumed much of the energy in the political arena after the elections of December 1997 in which the then ruling party Kenya African National Union (KANU) retained power. By late 1998, this process had been derailed and in the next two years, a protracted battle ensued to decide the process of constitutional reform. This is primarily because, the KANU government was not comfortable with the scope of the potential reforms. Most contentious were the proposals on devolution of powers through a federal (*majimbo*) system of government and the limiting of the powers of the President through the creation of the office of Prime Minister with ‘executive powers’.

The wrangling between the government and opposition parties saw the country going for the 2002 elections with no substantial constitutional reforms. The constitutional review process was hampered by divisive politics animated by high levels of political posturing and discord.²¹ More often than not, national interests were traded-off for the sectarian interests of politicians and other decision-makers.²² This would go on until the end of then President Daniel Toroitich Moi’s regime and the inception of Mwai Kibaki’s government in 2002 with the help of the National Alliance Rainbow Coalition (NARC) party.

The Kibaki government promised a new Constitution within its first 100 days in office, but could not deliver due to persistent wrangling within NARC. At that time, the Constitution of Kenya Review Commission (CKRC) had compiled a Draft Constitution, popularly known as the ‘Bomas Draft’, from the views it collected from the public. The draft provided for, among other things, the creation of the office of Prime Minister to share executive powers with the President. Due to disquiet from certain quarters, a parliamentary committee was constituted in 2004 to amend the draft. The new draft compiled by the committee, known as the ‘Wako Draft’, was not acceptable to some Members of Parliament from the Liberal Democratic Party (LDP) and KANU since it sought to retain the enormous powers of the President.

21 African Peer Review Mechanism (n 2 above) 24.

22 Above.

The Wako Draft was later subjected to a referendum in November 2005 but was rejected by an overwhelming majority of voters. Other than the general dissatisfaction with the content of the document, ethno-politics once again determined the outcome of the vote. The 'Wako Draft' gained widespread support mostly in those areas dominated by Kibaki's *Kikuyu* tribe. It was within this context of ethnic divisions and animosity and the lack of legislative reforms, that the country's 2007 polls were conducted, whose outcome nearly consigned the country to a civil war.

The country was engrossed in months of civil unrest and political bickering, following the declaration of Mwai Kibaki as the winner of the presidential elections conducted in December 2007.²³ The wave of atrocities caught the eye of the international community, which stepped in to restore order and peace in the country. The African Union (AU) appointed a team of international experts to mediate over the crisis. At the on-set, the mediators constituted the Kenya National Dialogue and Reconciliation (KNDR) team, comprising of representatives of the wrangling political parties—the Orange Democratic Movement (ODM) and Party of National Unity (PNU).²⁴

It came to the attention of the team that the 2007 post-elections crisis was a culmination of both long-term and immediate causes. Behind the façade of alleged election fraud were decades-old tensions that instigated the national pandemonium. The long-term causes of the crisis therefore encompassed many unresolved issues, some dating way back to the time the country attained her independence. Endemic failures in governance and the lack of appropriate legislative and institutional reforms were at the pinnacle of such unresolved issues.²⁵ The PNU and ODM political parties therefore entered into negotiations in search of a political solution that would end the conflicts emanating from these issues. While

23 See The Standard Team 'New dawn as MPs convene' available at <http://www.eastandard.net> (accessed 12 December 2010).

24 See B Namunane 'Annan pleads for grand coalition government' available at <http://www.nationmedia.com> (last accessed on 12 December 2010).

25 Human Rights Watch 'Ballot to bullet: Organised political violence and Kenya's crisis of governance' (2008) 20/1 (A) 3.

the negotiations began with a wide gulf between the two sides, the adroit management of the lead mediator, Kofi Annan, produced a Peace Accord in March 2008.

The main provision of the agreement was that a grand coalition government would be created in which the two parties would share power. Executive authority would be divided between the two, with the PNU maintaining control of the Presidency and ODM filling the newly created Prime Minister's position. Cabinet positions would be distributed according to the principle of 'portfolio balance', by which each of the two sides would receive an equal share of ministerial positions.

In accordance with the Accord, two critical laws were enacted—the Constitution of Kenya Amendment Act, 2008 and the Constitution of Kenya Review Act, 2008—to jump-start the stalled constitutional review process. The Parliamentary Select Committee (PSC) on the Administration of Justice was tasked to spearhead the process and it proposed a team of experts who were to review the Constitution in accordance with a roadmap established by Parliament. Through the efforts of the Committee of Experts (COE), a Harmonised Draft Constitution was unveiled on 17 November 2009. After fine-tuning a number of subsequent drafts, the Proposed Constitution was presented to the Attorney-General on 7 April 2010, officially published on 6 May 2010, and was subjected to a referendum on 4 August 2010 in which 67% of the population approved the document. The outcome of the referendum ushered the country into a new constitutional dispensation.

THE BOOK

Given the fact that Kenya has and continues to be hailed within the African continent and the postcolonial world as an excellent case study in constitution-making, reform and constitutionalism, this book is tailored to equip both Kenyan and international students of constitutional law and comparative politics with an all-inclusive and in-depth treatise on the country's constitutional experience and the key issues that are encapsulated in the new Constitution. It is only through an even-handed appreciation of such rich experience as

illustrated in the Kenyan case that plausible analyses can be made to inform other similar disconcerting situations.

The book contains nine chapters. In Chapter One, PLO Lumumba takes the reader through the journey of time in search for a new Constitution. The chapter is premised on the argument that one undisputable fact about Kenya since independence has been the elusiveness of attaining a viable constitutional dispensation. It is in this regard that the chapter is devoted to narrating Kenya's constitutional history. It makes reference to constitutional developments from the country's independence in 1963 to the adoption of the new Constitution in 2010.

In Chapter Two, Dennis Ben Mosota evaluates the concepts of constitutionalism and the rule of law under the new constitutional order. The author argues, while the new order is expected to deal with the question of ethnic diversity in a very substantial way, many daunting challenges and obstacles threaten its promise for a better Kenya. These impediments include lack of constitutionalism, diminished space for the rule of law, ethnicity and the attendant problems of conflict and political disquiet. Mosota contends that management of these concerns against the twin prisms of constitutionalism and the rule of law are important in understanding democratic governance of a country. His chapter therefore reassesses the presupposition of constitutionalism and the rule of law under the new dispensation, and proposes the need for a minimum threshold of legitimacy for the two concepts to be mainstreamed in the national psyche.

Chapter Three of the book is an analysis of the Bill of Rights. In this chapter, Morris Kiwinda Mbondenyei contends that the Bill of Rights is an integral part of Kenya's democratic governance and is the framework for social, economic and cultural policies. The chapter therefore extensively underscores the specific rights entrenched in the Kenyan Bill of Rights. It equally highlights how the new Constitution has initiated a marked departure from what obtained in the Independence Constitution in so far as the promotion and protection of human rights in Kenya is concerned.

Gender equality as an important aspect of the new constitutional dispensation is categorically underscored in Chapter Four of the book. Ruth Aura Odhiambo and Maurice Oduor succinctly elucidate how the new Constitution has attempted to remedy previous gender disparity through the promotion of gender equality. There is little doubt that Kenyan women have historically been accorded less than favourable treatment in various spheres compared with men. This difference has stemmed from mere sexual or biological distinction between male and female; a distinction that has been used as the basis for ascription of roles and entitlements to these sexes. In their chapter, the authors discuss how the new Constitution incorporates gender equality within its framework. They assess whether and the extent to which the new framework has sought to dismantle longstanding legal barriers on women.

In Chapter Five, Tom Ojienda and Mathews Okoth highlight on the provisions of land and environment under the new Constitution. The authors are of the view that the new Constitution responds in various ways to the historical injustices in land that have bedevilled Kenya since independence. For example, the indiscriminate Presidential discretion in allocation of land in cities, municipalities, townships and government lands now must be sanctioned by statute. Similarly, use of corporations as conduits for land grabbing through which the public lost colossal amounts of money is curbed by the need to disclose not only the owners of corporations that own land and to whom benefits from such corporations accrue. Further, the Constitution recognises ancestral land, and this addresses the squatter problem at the Coast where the indigenous Mijikenda communities have for generations been rendered squatters at the behest of political stooges. The chapter therefore interrogates the procedure for land and environment governance under the repealed Constitution and related laws and under the new Constitution. It also identifies crucial areas for amendment in the existing land laws to align them to the new Constitution.

The doctrine of separation of powers is discussed in Chapter Six of the book. Elisha Ongoya advances the argument that, for every Constitution to meet its desired objective, it must be designed in a manner that guarantees responsible use of power. He further argues

that it is absolutely essential for the Constitution to pay homage to the principles and the thinking of constitutional theory in designing and structuring distribution of power. In his chapter, Ongoya revisits the theory of separation of powers as considered in scholarship circles to have been initially advanced by French Enlightenment political philosopher Baron De Montesquieu and expounded on by other scholars. He then proceeds to look at the new Constitution and a number of aspects relating to recognition and vesting the exercise of power. The assignment of power within the conventional three organs of the state is considered.

A notable feature of the new Constitution is separation of powers through the system of devolved government. In Chapter Seven of the book, Steve Ouma Odero underscores this phenomenon, which has been the single most highly contested and divisive question in the last two decades of Kenya's constitutional history. He argues that the system of devolved government had and continues to be advanced as the ultimate means of realising equitable distribution of resources, managing the country's ethnic diversity amongst other equitable national goals. Odero's chapter, therefore, examines the design, potential perils and possibilities for success of the devolved system of government entrenched in the new Constitution.

Another notable feature of the new Constitution is the express regulation of international law in Kenya. In Chapter Eight of the book, Luis Franceschi helps the reader to understand how, under the new constitutional order, international law relates to Constitutional law. His chapter analyses the regulation of the foreign affairs power in some African Constitutions and makes a special reference to the new Constitution of Kenya. He notes a marked departure from the previous constitutional dispensation to the effect that, under the new Constitution, Kenya is now entirely monist. This means, legislative approval of a treaty is not required at any instance, except as provided for by Article 71 of the Constitution on agreements relating to natural resources. In other words, international law is now a source of law in Kenya and treaties once ratified are part of domestic law.

In Chapter Nine, Victor Odhiambo explores the opportunities and challenges facing the implementation of the new Constitution. The author argues that there is a greater challenge that lies in the implementation of the Constitution because Constitutions are not merely texts embodying concepts, principles, and ideals. Rather, they are living documents, and in Kenya's case, the new Constitution has to be brought to life by a deliberate and committed process as put forth in the implementation schedule of the document. It is thus important that the Constitution be implemented in the manner that ultimately fosters constitutionalism. This process of implementation must be inclusive and broad-based from the perspective of the Kenyan populace and must guarantee the ideals of good governance and be reformative in nature.

CHAPTER ONE

A JOURNEY THROUGH TIME IN SEARCH OF A NEW CONSTITUTION

PLO LUMUMBA*

1 INTRODUCTION

One undisputable fact about Kenya since independence has been the elusiveness of attaining a viable constitutional dispensation. While the Independence Constitution sought to establish a feasible constitutional order, it fell prey to numerous amendments. These were effected in a manner that defaced the document that would otherwise have defined a democratic dispensation for Kenya. Before its repeal on 27 August 2010, the document had undergone numerous amendments. Of this, the High Court of Kenya had previously lamented thus:

Since independence in 1963, there have been thirty-eight (38) amendments to the Constitution. The most significant ones involved a change from Dominion to Republic status, abolition of regionalism, change from a parliamentary to a presidential system of executive governance, abolition of a bicameral legislature, alteration of the entrenched majorities required for constitutional amendments, abolition of security of tenure for judges and other constitutional office holders (now restored), and the making of the country into a one party state (now reversed). And in 1969, by Act No. 5 Parliament consolidated all the previous amendments, introduced new ones and reproduced the Constitution in a revised form. The effect of all those amendments was to substantially alter the Constitution. Some of them could not be described as anything other than an alteration of the basic structure or features of the Constitution. And they all passed without challenge in the courts.¹

* PhD in Law (Ghent); LLM, LLB (Nairobi); PLO Lumumba, an Associate Professor of public law, is the Director of Kenya Anti-Corruption Commission (KACC) and the Founding and Senior Partner at the Law Firm of Lumumba & Lumumba Advocates. (Currently on leave of absence)

1 *Njoya & 6 others v Attorney General & 3 others*, Kenya Law Reports, 1 (2004) 298–299.

Indeed, while a majority of these amendments may have offered safe havens for the political class, some of them have been beneficial to the citizenry. In fact, with the emergence of the democratisation wave of early 1990s, constitutional scholars have observed that the various constitutional changes taking place in the post-1982 era were positive efforts geared towards democratisation. The re-introduction of multi-party democracy in early 1990s for instance characterised the nature of this wave.

The search for a new constitutional dispensation in Kenya is, therefore, long overdue. It is in this regard that the rest of this chapter is devoted to narrating Kenya's constitutional history. The chapter is divided into four main parts. After a brief introduction, the chapter first deals with the conceptual framework as certain key concepts call for definition and elucidation. It then makes reference to constitutional developments during independence up until the adoption of the Independence Constitution. A historical account of the various amendments that have been made to the Independence Constitution is undertaken in the third part. Finally, it concludes by looking at contemporary constitutional developments.

Scholars have often singled out constitutionalism as one of the cardinal concepts in constitutional law. Given that the foundation of this word is the term Constitution, it is thus important that this chapter lays bare the meaning of the two notions. According to Bradley, a Constitution is 'a document having a special legal sanctity which sets out the framework and the principal functions of the organs of government within the state, and declares the principles by which those organs must operate.'² Acknowledging, however, that some countries like the United Kingdom (UK) do not have a Constitution in a documentary form, Wheare refers to Bolingbroke's definition of a Constitution as:

...the assemblage of law, institutions and customs, derived from certain fixed principles of reason...that compose the general system, according to which the community hath agreed to be governed.³

2 AW Bradley & K Ewing (eds.) *Constitutional and administrative law* (1994) 4.

3 *A dissertation upon parties* (1733) as cited by Bradley and Ewing (n 1 above) 4.

A Constitution is therefore an embodiment of a system of governance agreed upon by the governed irrespective of whether this is contained in a legal document or customs and usages. On the other hand, the term constitutionalism is derivative from that of a Constitution. This notion has often been attributed to the inevitable need to limit governments.⁴ In this regard, perhaps De Smith offers a more comprehensive definition when he observes thus:

The idea of constitutionalism involves the proposition that the exercise of governmental power shall be bounded by rules, rules prescribing the procedure according to which legislative and executive acts are to be performed and delimiting their permissible content—Constitutionalism becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of political liberty.⁵

Numerous scholars have associated themselves with this school of thought. Bradley and Ewing, for instance, have argued that the very existence of ‘constitutions springs from a belief in limited government.’⁶ Nwabueze further emphasises that constitutionalism as a concept connotes a limitation on the ‘arbitrariness of political power’ thus a limitation on government.⁷ This is further underscored by Osogo who maintains that fundamental rights and freedoms of the citizenry are more secure where government structures are properly erected.⁸ In the literal sense, constitutionalism can thus be said to be an evaluation of the extent to which the form, substance and legitimacy of constitutional principles as embodied in the Constitution are practiced. Thus, not only does constitutionalism elevate the concept of the rule of law but it also delineates the governance structures while subjecting them to various checks and

4 Bradley & Ewing (n 1 above) 8.

5 SA De Smith *The new Commonwealth and its constitutions* (1964) 106. See also J Hatchard, M Ndulo & P Slinn *Comparative constitutionalism and good governance in the Commonwealth* (2004) 1.

6 Bradley & Ewing (n 1 above) 8.

7 B O Nwabueze *Constitutionalism in the emergent states* (1973) 1.

8 O Ambani ‘The state of constitutionalism in Kenya-2007’ in W Kioko (ed.) *Constitutionalism in East Africa* (2007) 54.

balances to ensure that the citizens' fundamental freedoms and rights are safeguarded. All these must, however, happen at both procedural and substantive levels.

In attempt to stretch the concept further, Katz declines to limit constitutionalism to the structural and institutional arrangements of a country but claims that the practice of constitutionalism must embrace a political structure that respects the rule of law, in which the government reflects the values and aspirations of the community.⁹ According to Katz, Constitutions need not only to reflect the rule of law but the aspirations or the realities of a given society. The community specifies its basic rules, agrees to abide by the rule of law and established governance structures which guarantee adherence to the set societal values.¹⁰ Yet again, some scholars have cast spell on this traditional way of defining this notion. According to Baker, long gone are the days when constitutionalism would be said to be grounded in domestic laws or territorially defined *demos*, but modern Constitutions require conformity with 'a system of universal norms as elaborated by a community of nations.'¹¹ Emerging from these universal norms is a trans-national culture of values. The emergent practice of the principles embodied in these type of constitutions is what Baker terms as 'trans-national constitutionalism.'¹²

Agreed that constitutionalism implies a limited government—defined by both territorial and trans-national values— Nwabueze poses three cardinal issues. First regards the form of the restraints to be imposed on government. These need not necessarily be in a legal document, but as is the case in the UK, such restraints can be embodied in tradition and usages.¹³ The latter system, however, has got its own challenges. Since the limitations or sanctions imposed by this kind of a Constitution on the government is not as a matter of law but tradition, Nwabueze argues, it implies that

9 S N Katz *Constitutionalism in East Central Europe: some negative lessons from the American experience* (1994) 14.

10 As above 9.

11 LC Baker 'From Constitution to constitutionalism: a global framework for legitimate public power system' (2009) 3 *Penn State law Review* 676.

12 As above 677.

13 Nwabueze (n 7 above) 3.

the government is not legally bound to its provisions and to the extent it infringes such a Constitution, then such an act or omission cannot be deemed to be illegal. In this case, the legal sovereignty and supremacy is bestowed in the legislature which has the absolute power of law-making. As to whether a legislature enjoying absolute legal sovereignty under an unwritten Constitution is in tandem with the principles of constitutionalism is a question worth considering in a different forum.

Second is the nature or content of the prerequisite restraints necessary for any government to be deemed to be practicing constitutionalism. Borrowing from de Smith, Nwabueze refers to the minimum essential restraints for constitutionalism in any government as: a government that is genuinely accountable to a certain entity or organ distinct from itself; a government that conducts free, fair and periodic elections that embrace the principle of universal adult suffrage and in which a multi-party system is duly recognised; and a guarantee of civil liberties enforceable by the judiciary.¹⁴ All these must exist simultaneously, otherwise, constitutionalism would be considered absent. Third, every government ought to ask itself the extent to which such constitutional restraints are observed in practice or whether they are a mere mirage.

Emerging from the foregoing, constitutionalism can be said to embrace numerous elements. First, it requires differentiation of governmental functions. This involves the separation of functions of government between the executive, legislature and judiciary. Second, it requires an installation of a system of checks and balances to ensure effective separation of powers by balancing the powers of one organ as opposed to the other. Third, having emanated from a body superior than the legislature— which is the people— constitutionalism requires that a Constitution be endowed with supremacy over other laws. Other emergent principles embodied in constitutionalism include: popular representation in government and a guarantee of individual freedom and liberties. The inevitableness of constitutionalism in nascent democracies like Kenya cannot be exaggerated. As the legend Montesquieu has lamented:

14 Smith (n 5 above) 106. See also Nwabueze (n 7 above) 10.

...experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it would go...To prevent this abuse, it is necessary from the nature of things that one power should be a check on another...When the legislative and executive powers are united in the same person or body... there can be no liberty...¹⁵

Perhaps the foregoing informs the numerous attempts at constitutionalism in Kenya since colonial times.

2 THE KENYAN CONSTITUTION AT INDEPENDENCE

The state of constitutionalism in Kenya at independence is best understood within a historical context. Selective insights into the colonial periods thus suffice to ground the reader with a proper understanding of the various developments towards constitutionalism in Kenya during this epoch. Ghai and Mc Auslan have divided historical developments in constitutional writing during the colonial era into five different phases: the period between 1897 and 1905; the period between 1905 and 1923; the period between 1924 and 1954; the phase between 1954 and 1960 and the period between 1960 and 1963.¹⁶

2.1 THE PHASE BETWEEN 1897 AND 1905

This epoch exemplified attempts by the British government to establish a machinery of government in colonial Kenya. The development of judicial and legislative processes typified constitutional developments in this era.¹⁷ The East African Order in Council of 1897, establishing the administrative machinery for the East African region, was the first legislation to be adopted.¹⁸ This put a lot of emphasis on judicial power as well as establishing the various judicial institutions.¹⁹ Another notable feature about the Order is the establishment of a Commissioner as the Chief Executive Officer of

15 B de Montesquieu *The Spirit of Laws* (1949) 4.

16 Y P Ghai & J P Mc Auslan *Public law and political change in Kenya* (2001) 37.

17 As above.

18 As above.

19 See the East African Order in Council of 1897, Chapter IV.

the territory responsible for the establishment of administration.²⁰ In him, were bestowed both legislative and executive powers. The 1897 Order in Council was later to be repealed and replaced by another of 1902. The latter shifted emphasis from judicial institutions to administration. Administrative powers were also vested in the Commissioner but subject to instructions from the imperial government.²¹

2.2 THE PHASE BETWEEN 1905 AND 1923

During this period, the European settlers sought to spearhead their interests and have them safeguarded in the law.²² This agitation culminated into the promulgation of yet another Order in Council of 1905 embodying settler achievements. First, the protectorate's chief officer was moved from the Commissioner to the Governor and Commander-in-Chief.²³ This in turn adversely affected the powers of the Commissioner especially because this change was accompanied by the formation of two new institutions: the Legislative Council and the Executive Council.²⁴ While the Legislative Council was charged with the responsibility of making law and 'expressing public opinion', the Executive Council was responsible for advising the governor 'on the application and execution of enactments, the conduct of native affairs and all important matters connected with the administration.'²⁵ The Governor, however, retained the power to veto any legislation passed by the Legislative Council. On the other hand the imperial government retained the right to disallow any legislation passed by the council and to legislate directly for the colony through orders in council or issuance of Royal Instructions.²⁶

20 As above

21 Ghai & Mc Auslan (n 16 above) 41.

22 As above 42.

23 As above 43.

24 As above.

25 As above 44.

26 As above.

2.3 THE PHASE BETWEEN 1924 AND 1954

In 1920, a Constitution was established by the Letters Patent and Royal Instructions.²⁷ While the powers and functions of the Legislative Council were retained, several amendments were made as to its composition in order to cater for diverse interests as fronted by the various races.²⁸ This took into account the need for the representation of the Indians, Arabs and African.²⁹ It is instructive to note further that in 1920, a part from the Coastal Strip, the whole East African protectorate was annexed as a colony.³⁰

2.4 THE PHASE BETWEEN 1954 AND 1960

The period between 1954 and 1960 marked the fourth phase of constitutional development.³¹ This period witnessed the introduction of the Lyttelton Constitution³² which embodied two significant changes. First, it sought to introduce active participation of all races into the affairs of the government irrespective of their numerical strength.³³ Second were concerns over the composition and powers of the Executive Council. While the powers and function of this council ceased to be pure advisory in nature, in practice, at least, it became more of an admission to the share of power.³⁴ The Lyttelton Constitution further established a Council of Ministers as 'the principal instrument of government that would exercise collective responsibility for decisions on government policy.'³⁵ Even though

27 As above 52.

28 As above.

29 Section xv of the Royal instruction, 1920; Additional Royal Instructions, 1925, as cited by Ghai & McAuslan (n 16 above) 52.

30 Kenya (Annexation) Order in Council, 1920, as cited by Ghai & McAuslan (n 16 above) 50.

31 Ghai & McAuslan (n 16 above) 36.

32 Additional Royal Instructions, 13 April 1954, Government Notice 582/1954, as cited by Ghai & McAuslan (n 16 above) 67.

33 Ghai & McAuslan (n 16 above) 66.

34 As above.

35 As above.

the Executive Council was retained in the Constitution, its powers were greatly reduced.³⁶

Following continued agitation by Africans for more representation in the Legislative Council, coupled with the fact that the Lyttelton Constitution was designed to last until 1960, the colonial secretary made his own resolutions after failed attempts at negotiations.³⁷ This formed the basis of a new constitution known as the Lennox-Boyd Constitution of 1958. This constitution was established through an Order in Council which repealed the Royal instructions, Letters Patent and Order in Council that previously constituted the constitution. It elucidated several achievements for Africans as their representation in the Legislative Council was effectively increased from two to fourteen. The creation of a Council of State was yet another significant creature of this constitution.³⁸ Its mandate was to protect all communities from harmful legislation. Thus, its main responsibility was to examine proposed legislation to ensure that such did not offer differential or advantageous treatment to one community as opposed to another.³⁹ Given the difficulties inherent in implementing this constitution, coupled with un-co-operative African members in the Legislative Council, the need for a constitutional conference was long overdue. This led to the Lancaster House Conference of 1960 which ushered in the fifth phase of constitutional development.

2.5 THE PHASE BETWEEN 1960 AND 1963

This conference formed a roadmap towards an independent Kenya. The issues that were deliberated upon included the character of the Executive, the composition of the Legislative Council and both electoral and property safeguards.⁴⁰ This conference was subsequently

36 As above. They include: the need to be consulted by the Governor before exercising his prerogative of mercy, need to be consulted by the Governor on any bill that was proposed that a minister introduces in the legislature, and finally the Governor could refer any matter to the Executive Council so long as he first consulted the Council of Ministers.

37 Ghai & Mc Auslan (n 16 above) 70.

38 As above 71.

39 As above 72-73.

40 As above 74.

followed by yet another Lancaster House Conference in 1962 as well as protracted meetings in Nairobi. As a result of all these meetings, Kenya was granted internal self governance on 1 June 1963 under a new self-government Constitution.⁴¹ It is this Constitution that formed the basis of the Independence Constitution with minor modifications.⁴²

The Independence Constitution was modelled on the Westminster version. Four notable features can be discerned from this Constitution. First, it embodied an extensive system of regionalism (what became to be commonly referred to as *Majimboism*). The country was divided into seven regions with each enjoying its independent legislative and executive powers.⁴³ According to Ghai and Mc Auslan, this not only provided the organic kernel through which power was shared equally but also a channel for all tribes (especially the minorities) to participate in the process of government.⁴⁴ Every region had its own president who was elected by the members of the Assembly.

Secondly, it established the position of Prime Minister. He was to be an appointee of the Governor and a member of the House of Representatives who commanded support of the majority.⁴⁵ While acting in this capacity, the Governor was to act on the advice of the cabinet.⁴⁶ Third, the name of the Legislature was changed to Central Legislature and later at independence 'the Parliament'. The Parliament comprised of the National Assembly and the Queen. The National Assembly was bicameral: House of Representatives as the lower house and the Senate as the upper house.⁴⁷ The members of the upper house were elected directly from all the forty (the old administrative units) districts and Nairobi area. Fourth, it embodied a chapter on the Bill of Rights which sought to protect minority rights from abuse of power. The Independence Constitution, however, fell

41 As above 177.

42 As above.

43 Chapter 5, Self-government Constitution.

44 Ghai & Mc Auslan (n 16 above) 196.

45 As above 178.

46 As above

47 As above

short of a pure Westminster model in that the Governor retained immense legislative and executive powers with respect to foreign affairs, internal security and defence.⁴⁸ Similarly, the Governor's veto over legislation was retained with limited chances of barring it.⁴⁹

Like most emergent states, Kenya's Constitution at independence was adopted for it by the colonial power. Neither did the citizenry take part in its drafting nor was there a referendum to have the document endorsed by the public. As a result, the document lacked the much needed legitimacy and the moral authority from the people it sought to govern. Besides, the colonial government can be said to have been too naïve to impose a document on independent Kenya during the sunset days of colonialism and without an established tradition of the numerous democratic principles that the document sought to introduce. Perhaps this best explains why the values of this Constitution were never fully implemented and often fell prey to mutilation to serve the selfish interests of the political class. This in turn crippled the practice of constitutionalism in independent Kenya contrary to what might have been earlier on contemplated by the colonialists.

3 THE KENYAN CONSTITUTION IN THE POST-INDEPENDENCE ERA: A HISTORICAL ACCOUNT OF CONSTITUTIONAL AMENDMENTS IN KENYA

The constitutional period following the adoption of the Independence Constitution was characterised by more drama. The political class seemed more content with a defaced Constitution that best served their interests than the practice of constitutional principles. This informed numerous changes that were undertaken in order to ensure maximum control of political power, eradication of any check systems and accountability mechanisms. In the view of Okoth-Ogendo, much focus was made on the Constitution as a document while the practice of constitutionalism was completely disposed of. Thus, he wrote:

48 S 68.

49 S 49.

The paradox lies in the simultaneous existence of what appears as a clear commitment by African political elites to the idea of the constitution and an equally clear rejection of the classical or at any rate liberal democratic notion of constitutionalism.⁵⁰

Indeed, the first amendment to the Independence Constitution of Kenya was effected through the Kenya Amendment Act number 28 of 1964. This was first introduced in the House of Representatives in October 1964 and 'it made far-reaching changes to the structure and content of the Independence Constitution'⁵¹ which was viewed to be 'too rigid, expensive and unworkable.'⁵² Its main purpose was to declare Kenya a sovereign Republic as from 12 December 1964. This amendment further abolished the post of Prime Minister and provided that a President would be elected at a General Election and the nomination of the Presidential candidate would have to be supported by at least one thousand registered voters.

Thus the first Prime Minister by virtue of section 8 of the amendment Act became the President. The President was vested with a dual role: as Head of State and Government, and also as the Commander-in-Chief of the Armed Forces. As Head of State, he was vested with the power to address both Houses of the National Assembly. This was introduced by amendment of section 33 of the Constitution. The President was also vested with the 'power to summon, to dissolve or prologue Parliament at his own discretion.'⁵³ As Head of Cabinet, he could attend the deliberations of the House, vote on any issue brought to the floor of the House, attend all proceedings of the Senate and participate in the proceedings of the Senate.

What's more, this amendment removed the privileges and prerogatives which the Queen had enjoyed in respect of Kenya and they were vested in the Government of Kenya as from 12 December

50 H. W. O. Okoth-Ogendo 'Constitutions without constitutionalism: Reflections on an African political paradox' (A working paper prepared for the American Council of Learned Societies Comparative Constitutionalism Project) (1988) 66.

51 G Muigai 'Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997): A study in the politics of the Constitution' (2001) PhD Thesis, University of Nairobi.

52 Ghai & Mc Auslan (n 16 above).

53 S 58 & 59 of the Independence Constitution.

1964 to be exercised by the President.⁵⁴ This amendment further created the post of a Vice-President who would be appointed by the President from among the elected members.⁵⁵ In addition, the President was bestowed the power to appoint and dismiss Ministers and public officers who previously were appointees of the Public Service Commission. The control and operation of the police was centralised, its Service Commission abolished and its functions transferred to the Public Service Commission whose members were presidential appointees.

It is instructive that throughout the negotiations of the Independence Constitution, the then ruling party, Kenya African National Union (KANU), was consistently opposed to the *majimbo* (Regional) system of government. Not only was KANU saddened by the Constitution's decentralisation of the role of the Public Service Commission in employment, deployment and management of personnel matters, but also viewed the *majimbo* Constitution as a conspiracy between the ethnic minorities and the colonial government.⁵⁶ KANU feared the restrictive nature of the *majimbo* Constitution and feared that if implemented, it would impede their operational parameters.⁵⁷ It was, therefore, determined to get rid of it once it got into power.

Thus, once in power, KANU sought to dilute the provisions governing the Regional government by effecting the following constitutional changes in the first amendment:

- It repealed the provisions that allowed for independent revenue of the Regions⁵⁸ in order to totally subject the regions on grants from the centre;
- It deleted most of the regional provisions for exercise of power over agricultural, veterinary and educational matters;

54 S 16 of the Constitution of Kenya (Amendment) Act 1964.

55 As above, s 12.

56 W Oyugi 'The search for an appropriate decentralisation design in Kenya: Historical and comparative perspectives' in K Kindiki and O Ambani (eds.) *The anatomy of Bomas: Selected analysis of the 2004 draft constitution of Kenya* (2004) 67.

57 Oyugi (n 56 above).

58 This amendment was effected by virtue of Act no. 38 of 1964.

- It revised the regional taxation powers;
- It abolished the regional contingency provisions⁵⁹ which affected the control and operations of the police force;
- Parliament was vested with power to establish and supervise local authorities;
- The President was vested with the sole exclusive power over government land;⁶⁰
- It also abolished the central land board.

Accordingly, the first amendments not only established Kenya as a Sovereign Republic but also weakened the *majimbo* system. A majority of the substantive provisions of the regions famously known as *jimbos* were repealed thus the regions were left to the whims of what was expressly provided for by the central government. This gave birth to what some constitutional scholars have termed as 'Imperial Presidency'⁶¹ resulting into a complete centralisation of power and authority.

The second amendment was passed on 1 December 1964. This amended the chapter on the Judicature.⁶² In effect, the President was vested with the power to appoint the Chief Justice without consulting the regions. He was at liberty to make judicial appointments without consulting the Judicial Service Commission and to initiate an investigation into the conduct of the judge for purposes of removal of the judge. It further transferred from the regions as a whole the power to alter the regional boundaries and vested this power in Parliament. It also repealed all provisions for independent regional revenue collection thus creating dependence on the central government for grants.

The third Amendment came by virtue of the Constitution of Kenya (Amendment) Act No. 16 of 1965. Through this Amendment, KANU quenched its fears by abolishing '*majimboism*' in total. This amendment completely did away with the regional structure and replaced these structures with Provinces and Councils. Additionally,

59 S 16 of the Constitution of Kenya (Amendment) Act 1964.

60 This was achieved by repealing s 203 of the Independent Constitution.

61 Okoth-Ogendo (n 50 above) 17.

62 Chapter 10 of the Independence Constitution.

it sought to alter the restrictive constitutional amendment procedure that had been foreseen by the colonial government as a safeguard that would ensure the endurance of the Independence Constitution. This amendment lowered the majority requirement for amending the Constitution from 90 per cent in the Senate and 75 per cent in the Lower House to 65 per cent. A new requirement provided that no alterations could be made if the Bill or amendment had not been first presented to the President for assent. The only exception was where the Speaker was allowed to issue a certificate to do away with this requirement because time had lapsed. Ironically, these new amendments were seen as safeguards. In the words of the then Attorney General, Charles Njonjo:

The Constitution may be amended by a Bill supported by a two third majority in both houses of Parliament. Such a requirement is a sufficient safeguard against ill-considered amendment. In the last resort, the only safeguard of the Constitution is that it is acceptable to the majority of the people it governs.⁶³

This amendment further provided that a simple majority was sufficient for the declaration of a state of emergency. Other changes brought about by this amendment included:

- Abolition of provisions relating to the executive power of the regional assemblies;
- Parliament was vested with power to confer functions on the provincial councils;
- The Court of Appeal was made the final appellate court for Kenya;
- The right of Appeal to the Privy Council was abolished as the Supreme Court of Kenya was re-named the High Court.

The fourth amendment was via the Constitution of Kenya (Amendment No. 2) Act No. 17 of 1966. It provided that if a Member of Parliament (MP) was absent from parliament for more than eight consecutive sittings without the Speaker's permission or if they had been imprisoned for a term exceeding 6 months, they would automatically lose their seat in Parliament. This amendment

63 *Hansard Report* 23 March 1965 Column 697.

was meant to safeguard the electorate on grounds that such absence would deny the electorate an opportunity of representation. The President could, however, pardon an MP guilty of this. Some scholars have, however, been of the opinion that these amendments were ill-advised as they were matters that could be easily dealt with as part of party discipline and also under ordinary legislation.⁶⁴

The fourth amendment further vested in the President the power to constitute and abolish offices of public servants. In turn, this adversely affected the independence, impartiality and political neutrality of the civil service. Moreover, the emergency powers vested in the President by the third amendment were further widened by the latter amendment. This amendment additionally extended the President's power to rule by Decree in certain areas such as Marsabit, Isiolo, Tana River and Lamu districts.

The fifth amendment was effected *vide* the Constitution of Kenya (Amendment) (No. 2) Act No. 17 of 1966. This Amendment introduced a requirement which was famously known as the 'turn coat rule'. It required that an MP who resigned from a party that supported his/her election should resign from his/her seat in Parliament upon expiry of the session. The nature of this amendment was *ex post facto* as it purported to terminate the parliamentary tenure of sitting members. The passing of the fifth amendment further set the stage for the abuse of the process of law making. A motion was passed to reduce the publication of Bills from the fourteen-day period that was in existence, to one day. This gave birth to instant constitutional amendments. The debate on the adoption of the latter Bill for instance was read in the morning and then in the afternoon of the first day. Another motion was passed to exempt the Bill from the Standing Orders and the Bill was passed after the second reading.

The sixth amendment was achieved through the enactment of the Constitution of Kenya Amendment Act No. 18 of 1966. This amendment sought to amend section 29 of the Constitution which provided for parliamentary supervision in exercising of emergency powers. This was amended to bestow on the President the discretion to bring into operation section 111 of the Preservation of Public

64 See n 54 above.

Security Act, Chapter 57 of the Laws of Kenya, by order published in the Kenya Gazette. In effect it removed the exercise of emergency powers from Parliament and vested it in the President. The President could now rule by executive Decree without seeking for parliamentary approval for a period extended by the amendment to one month. This amendment also allowed for the President to authorise detention without trial with minimum safeguards.⁶⁵ By making every issue a constitutional issue and by violating laid down provisions so as to quickly effect amendments to the Constitution, this amendment greatly affected the institution of constitutionalism and the rule of Law. Little wonder, immediately after the amendment came into effect, trade unionists and political opponents in Kenya Peoples' Union (KPU) were detained.⁶⁶ This amendment became a political weapon meant to silence political opposition.

The seventh amendment was introduced in December 1966. The main effect of this amendment was the abolishment of the Senate. This entailed the merging of the two Houses of Parliament. Incidental to this amendment were the following changes:

- Forty-one parliamentary seats were created so as to accommodate the members of the Senate, following its abolishment.
- Parliament was granted another two-year term running from June 1968 to June 1970. This had the effect of interfering with the sanctity of the Constitution which provided that the life of Parliament could only be extended if the country was at war, or not for a period exceeding six months.
- The twelve specially elected members of the House of Representatives were taken in as the specially elected members of the new Parliament.⁶⁷ This amendment could be said to be contrary to the expectations of a democratic society⁶⁸ as it did not allow the electorate to choose their

65 J Quigley 'Cases on Preventive Detention Act' (1978-81) 11-14 *Eastern Africa Law Review* 225-239.

66 H. W. O. Okoth-Ogendo 'The politics of constitutional change in Kenya since independence 1963-1969' (1972) 71 *African Affairs* 282.

67 As above.

68 As above.

representatives. Instead, it vested offices in persons not elected to the offices as is the expected and necessary procedure.

The ninth amendment came into force through the enactment of the Constitution of Kenya (Amendment) Act No. 16 of 1968 and removed the last vestiges of regionalism. It did this by eliminating the provincial councils, repealed all past laws of the regional assemblies, and deleted from the Constitution all reference to the provincial and district boundaries and their alteration. The act of removal of regionalism altered the Independence Constitution as it had been the Constitution's fundamental part.

The tenth amendment changed the manner in which a President would be elected. It provided that the President would be elected in a General Election by the national electorate. The practice previously, however, had been to elect the President during a Presidential Election or the National Assembly where the latter was acting as an Electoral College, if the seat fell vacant mid-term. This Amendment further abolished independent candidature. The new requirement was that a person wishing to vie for a seat in a General Election was required to be nominated and be backed by sponsorship from a political party. Preliminary elections would be carried out within the political party and the party would then be expected to nominate a Presidential candidate.

Since the National Assembly was no longer vested with the right to elect the President if the seat fell vacant, a new provision was introduced. If the seat of the President fell vacant mid-term, an election was to be held within ninety days. The only qualification to this was that the seat should not have fallen vacant during the dissolution of Parliament. Pending the Presidential Elections, the Vice-President would perform the functions of the President. This was not without a few limitations that subjected this amendment to the requirement of the Cabinet's resolution.⁶⁹ This Amendment further gave the President full authority to invoke emergency powers.

⁶⁹ Matters such as preservation of public security, the appointment and dismissal of Ministers required the Resolution of the Cabinet.

It also altered the composition of the National Assembly by vesting them in the President, the power to appoint twelve nominated MPs.

The eleventh amendment ripped off the Speaker of the National Assembly the power to appoint the members of the Electoral Commission and vested them in the President. This amendment merged all the amendments discussed above into one document. It gave birth to a revised Constitution in April 1969. The twelfth amendment was enacted in 1974 as the Constitution of Kenya (Amendment) Act of 1974. It lowered the voting age from twenty one to eighteen. This in effect amended the Age of Majority Act, Chapter 33 of the Laws of Kenya.

The thirteenth amendment was effected by Constitution of Kenya (Amendment) Act No. 2 of 1974. This amendment introduced Kiswahili as the official language of the National Assembly. It was initiated by a Presidential directive requiring parliamentary proceedings to be in Kiswahili.⁷⁰ Like most previous amendments, the procedure invoked in the adoption of the latter violated the established Constitutional amendment procedure by dispensing with the fourteen day requirement for publication of a Bill. All the stages were debated in one sitting. The Bill was also debated in Kiswahili. Besides, this amendment was effected during deliberations contrary to the laid down procedure which required that a Bill cannot be amended after introduction to the National Assembly.

The fourteenth amendment came vide the Constitution of Kenya (Amendment) Act of 1975. Its main purpose was to make amends to the thirteenth amendment. This, it achieved by providing that Bills should now be presented in English and debated in either English or Kiswahili. It has, however, been lamented that it would have been sufficient if Parliament had instead amended the Standing Orders of the National Assembly (Powers and Immunities Act, Chapter 6 of the Laws of Kenya) to effect the language changes instead of effecting this as a constitutional amendment.

The fifteenth amendment was introduced by the Constitution of Kenya (Amendment) Act No. 14 of 1975. It extended the prerogative

70 This was declared by the late President Jomo Kenyatta on the 4 July 1974 at a KANU Governing Council.

of mercy which was the sole power of the President under section 27 of the Constitution. This was extended to include the power to pardon a person found guilty of an election offence. It is interesting to note that the Bill introducing the latter amendment was debated and passed in one afternoon. It was then given retroactive effect contrary to the principles of natural justice. This amendment was later to be subjected to immense political abuse to save those deemed to be politically correct when found guilty of election offences.⁷¹

The sixteenth amendment was enacted in 1977 through the Constitution of Kenya (Amendment) Act No. 13 of 1977. First, this amendment established the Court of Appeal of Kenya following the collapse of the East African Court of Appeal. Second, it sought to abolish the right to remit compensation after compulsory acquisition. This did not, however, comply with foreign exchange regulations as set out in the Exchange Control Act, Chapter 113 of the Laws of Kenya.⁷² This amendment further made it possible for the Chief Justice to sit both as a High Court Judge and a Court of Appeal Judge. As a Court of Appeal judge he would then act as the chair of the Appellate judges.

The seventeenth amendment was instituted *vide* the Constitution of Kenya (Amendment) Act No. 1 of 1979. This amendment sought to undo the effects of the thirteenth amendment, which was repealed by the fourteenth amendment. English could now be used as an alternative to Kiswahili in parliamentary proceedings. To qualify as an MP, one had to be proficient in both English and Kiswahili. Section 34 of the Constitution previously provided that Kiswahili would be the language for debate in Parliament. This amendment therefore sought to reconcile the provisions of section 34 of the Constitution with the amendment for language provisions as discussed under the fourteenth amendment above, by providing for both English and Kiswahili. Section 53 of the Constitution was also amended to provide that the official languages of Parliament would be both

71 Paul Ngei had been found guilty of an election offence at the famous Kapenguria trial and had been barred from contesting elections for five years. Since he was Jomo Kenyatta's friend, this amendment was passed with the sole intention of rescuing him.

72 Muigai (n 51 above) 140.

English and Kiswahili. This section previously provided that English was the official language for debate in parliament.

The eighteenth amendment was initiated by the Constitution of Kenya (Amendment) Act No. 5 of 1979. It provided that a public officer who wished to contest parliamentary elections had to resign at least six months before the election. The intention of this amendment was to prevent the abuse of office by public officers who wished to contest in parliamentary elections. Similarly, the procedure for adopting this Bill had been faulted. The Bill's publication period was not complied with in that instead of the required 14 days for publication, the Bill was put up for publication for 8 days.

The nineteenth amendment has been said to be a very significant amendment. It came into operation on 25 June 1982 and was brought about by virtue of the Constitution of Kenya (Amendment) Act of 1982. This is the amendment responsible for converting Kenya into a one-party state. The amendment introduced a new section, section 2A, in the Constitution. Thus all political power in Kenya was vested in the then ruling party, KANU, and one could not vie for any political office unless they subscribed to the ethos of the party. This amendment raised serious internal constitutional inconsistencies as it interfered with the Bill of Rights provisions allowing for freedom of association. Besides, by enacting this amendment, Parliament acted outside the scope of its power of law making as vested in it by section 47 of the Constitution.

Attempts to challenge the constitutionality of this amendment bore no fruits as was evidenced by the case of *Gitobu Imanyara v. The Attorney General*.⁷³ The applicant argued that this amendment was unconstitutional as it interfered with other rights guaranteed by the Bill of Rights. The High Court would not hear any of this as it dismissed the application. It is, however, instructive to note that at the time of the passing of the last amendment Kenya was experiencing a lot of political instability resulting from the attempted coup *de tat* of 1982.

The twentieth amendment was introduced by the Constitution of Kenya (Amendment) Act No. 7 of 1984. By virtue of this amendment, the High Court became the final Court for determination of an election petition.⁷⁴ The Office of the Chief Justice set up an election Court composed of a three-judge bench to hear all election petitions.⁷⁵ A High Court judge who had been appointed to the Court of Appeal was allowed to finalise the hearing of their matters while serving in the new capacity. This amendment further sought to increase the membership of the Public Service Commission to fifteen and its mandate was also extended to cover officials in the local authorities.

The twenty first amendment was introduced by the Constitution of Kenya (Amendment) Act No. 6 of 1985. This repealed section 89 of the Constitution and instead provided that a person would be recognised as a Kenyan citizen only if their mother or father was a Kenyan citizen. The twenty second amendment, launched by the Constitution of Kenya (Amendment) Act No. 14 of 1986, targeted the security of tenure of Constitutional office holders. It removed the security of tenure of the offices of the Attorney General and Controller and Auditor General. This caused a public outcry as it was seen to be an erosion of the independence of the two offices. It further set the limit for parliamentary seats at a maximum of 188 and a minimum of 168. This Bill too violated the amendment procedure as it was subjected to a publication period of twelve days contrary to the requirement of fourteen-day publication period.

The twenty third amendment was brought in *vide* the Constitution of Kenya (Amendment) Act 20 of 1987. It had the effect of making all capital offences— offences punishable by death as provided by the Penal Code, Cap 63 of the Laws of Kenya—to be non-bailable.⁷⁶ This not only restricted the discretion of the judiciary to award bail depending on the circumstances of the case

74 S 44 of the Independence Constitution.

75 Muigai (n 51 above) 155.

76 R Wasson 'Law and development in the Third World: Ensuring protection for the rights of criminal offenders' in Y Vyas *et al* (ed.) *Law and Development in the Third World* (1994) 184-217.

but also interfered with the constitutional right to bail.⁷⁷ The twenty fourth amendment was introduced by the Constitution of Kenya (Amendment) Act No. 4 of 1988. It altered the requirement that suspects of capital offences be held for not more than (Twenty four) 24 hours. It required suspects of capital offences to be held for a period not exceeding fourteen days. It also removed security of tenure from the office of the Public Service Commission (PSC), the High Court judges and the Court of Appeal judges. It further created the office of the Chief Magistrate and Principal Magistrate.

The twenty fifth amendment that came by virtue of the Constitution of Kenya (Amendment) Act No. 2 of 1990 restored the security of tenure of all the offices affected by the twenty fourth amendment.⁷⁸ The twenty sixth amendment was initiated through the Constitution of Kenya (Amendment) Act No. 10 of 1991. It provided that the maximum number of constituencies would be increased to 210 from a previous high of 188 and the minimum number of constituencies would now be 188 up from 168. The twenty seventh amendment is the most significant amendment in Kenya's democratic history. It came into being by virtue of the Constitution of Kenya (Amendment) Act No. 12 of 1991. This amendment repealed section 2A of the Constitution.

The twenty eighth amendment was introduced by virtue of the Constitution of Kenya (Amendment) Act No. 10 of 1997. This amendment reinforced the twenty seventh amendment by introducing section 1A into the Kenya Constitution to fill the gap resulting from the repeal of section 2A of the Constitution. In effect, this changed Kenya from a one-party state to a multi-party state. It further amended sections 7, 33, 41, 42A, 82 and 84 of the Constitution. It amended section 7 of the Constitution which previously provided that the President could only form a government from members of his own party. This amendment was effected in line with the introduction of section 1A which now provided for a multi-party system. The Constitution in section 33 previously provided that members would be nominated to the National Assembly by the

77 Muigai (n 51 above) 160-161.

78 Offices of members of the Public Service Commission, judges of the High Court, and judges of the Court of Appeal.

President. This amendment transferred this role from the President to parliamentary parties. The Constitution of Kenya in section 41 increased the electoral commissioners to twenty one. Further, section 42A was amended to add the role of voter education and ensuring free and fair elections as additional roles of the electoral commission.

This amendment further restored the jurisdiction of the Court of Appeal. It also sought to expand the right of appeal on constitutional matters to lie also with the Court of Appeal. This was included after amendment of section 84 of the Constitution which provides for right of petition to the High Court on constitutional violations. The twenty ninth amendment came by virtue of the Constitution of Kenya (Amendment) Act 2008. Its main purpose was to create a coalition government. It emanated from the disputed 2007/2008 elections as a form of national dialogue and reconciliation. It inserted a new section 15A⁷⁹ in the Constitution to provide for the establishment of the Office of the Prime Minister and Deputy Prime Minister. Section 17 of the Constitution was also amended to include in the Cabinet the Prime Minister and two Deputy Prime Ministers.

4 CONTEMPORARY CONSTITUTIONAL REFORMS

Years of a national clamour for a Constitutional review to make the Constitution a better instrument in the service of Kenyans have passed. There has been dissatisfaction with the way in which valuable sections of the Independence Constitution were changed and power concentrated in the Presidency. Indeed, the many political, social and economic problems facing the country were attributed to deficiencies in the Constitution.

The call for reform was therefore motivated by the need to update and improve the current Constitution. It was not, as for example, in Uganda, South African and Eastern Europe, a call for a radically new Constitution.

⁷⁹ S 3 of the Constitution of Kenya (Amendment) Act, 2008.

Demands for a systematic review of the Constitution were made as early as 1990 to the KANU Review Committee, headed by the then Vice-President Prof. George Saitoti. Amendments that caused concern were: one-party rule, detention without trial, removal of security of tenure for Judges, the Attorney-General, the Auditor-General, and the weakening of the principle of separation of powers. However, no action was taken as the KANU Review Committee considered these matters to be outside its mandate.

The pressure for a review heightened as the movement for the restoration of multi-party politics started in the early 1990s, led by the Citizens' Coalition for Constitutional Change, (4Cs) and religious organizations.

A large number of organizations, religious and secular, NGOs and political groups joined this movement. These included the National Council of Churches in Kenya (NCCCK), the Episcopal Conference of Catholic Bishops, the Law Society of Kenya (LSK), the International Commission of Jurists (ICJ) (Kenya Chapter) and the Kenya Human Rights Commission (KHRC). Immense pressure was also brought to bear by women's organizations for provisions on affirmative action to be adopted during negotiations and review.

Some groups unsuccessfully demanded comprehensive reform of the Constitution before the General Election of 1992. The demand for a comprehensive review gained momentum after that election as it became clear that re-introduction of plural politics was by itself, insufficient to democratise politics.

Meanwhile, a proposed new Constitution, titled "Proposal for a Model Constitution" was prepared and circulated by the Kenya Human Rights Commission, the Law Society of Kenya and the International Commission of Jurists, Kenya Chapter. This Proposed Constitution formed the basis of extensive consultations and workshops.

In the face of the popular demand for a review, in January, 1995 the Government announced plans to invite foreign experts to draft a Constitution for consideration by the National Assembly. However, this proposal came to nought and civil society pressure for

review through a people's convention heightened. Mass action was resorted to, leading to violence and deaths. In August 1997, reacting to stagnation in the efforts, parliamentary political parties formed their own forum, the 'Inter-Parties Parliamentary Group') IPPG).

The IPPG agreed on a number of reforms to be implemented before the General Election of 1997. These included the independence of the Electoral Commission, repeal of a number of laws restricting civil and political rights, such as freedoms of association and expression by political parties and annulment of the offence of sedition that was being used to clamp down on people who agitated for their rights. But these were only interim reforms to ensure fair elections, after which a comprehensive review would be undertaken. As a result of the early dissolution of Parliament, not all the proposed reforms were enacted. However, as part of the IPPG package, the Constitution of Kenya Review Act (1997) came into force as the machinery required to meet the goals of post-election Constitutional review.

The 1997 Act did not satisfy all the interested parties. It was viewed as a self-serving government mechanism. Opposition politicians and civil society demanded an opportunity to participate in the Constitutional Review Process. Consequently, negotiations with a large number of stakeholders were entered into at Nairobi's Bomas of Kenya and the Safari Park Hotel between June and October 1998. The aim was to identify an acceptable framework for the process. The result was that the Act was amended in 1998 to reflect the consensus reached during these negotiations. The salient features of these amendments were provisions for: -

- 1) a review commission made up of twenty-five members nominated proportionately, by stakeholders, not the President;
- 2) a time-bound procedure for nominations;
- 3) appointment of nominated Commission members by the President;
- 4) implementation of the one third policy for women representation; and
- 5) structuring of the review process to reflect the "bottom-up" approach, a people-driven Constitution-making process.

These principles were not, however, implemented since the major parties (particularly parliamentary political parties) disagreed on the process of nominating Commissioners. The ensuing stalemate resulted in each protagonist resolving to proceed separately guided by distinct approaches.

One group, the 'Ufungamano Initiative' backed by national religious organizations and organs of the Civil Society appointed a People's Commission of Kenya (PVK) structured on the provisions of the amended review Act. Despite constraints, such as limited financial resources and lack of parliamentary support, the Ufungamano Initiative Proceeded, nonetheless, to collect the views of the public on the constitutional issues.

The other was a parliamentary process backed by Kenya African National Union (KANU) led Government and allied political parties. This group established a Parliamentary Select Committee to determine what instruments would be necessary for a comprehensive review of the Constitution. This led to further amendments to the Review Act in 2000. The amendments introduced substantial changes in the legislative frameworks as agreed in 1998. Among these were that:

- the size of the Commission was reduced from twenty five to fifteen Commissioners plus two *ex officio* members;
- appointment of Commissioners on merit;
- consideration of ethnic, geographical and social diversity during selection of Commissioners by the President following their nomination by the Parliamentary Select Committee.

Following these amendments, the Constitution of Kenya Review Commission (CKRC) was finally established and fifteen Commissioners appointed in November 2000.

The existence of two separate processes was obviously unsatisfactory. There was danger that two opposed review Commissions would intensify political conflict, even cause violence, and that their results would not be adopted as the new Constitution since neither party had sufficient votes in the National Assembly. Efforts to bring about a merger of the two process were undertaken by the Chairperson of the CKRC, Prof. Yash Pal Ghai by facilitating

negotiations between the Steering Committee of Ufungamano and the Parliamentary Select Committee.

Sensing the deep and widespread wish by Kenyans for a common process to promote national unity and peace and to produce a Constitution enjoying nationwide support, the negotiation parties took several courageous decisions that led to the merger. The Review Act was again amended in May, 2001, to incorporate the terms of the merger agreement. Twelve Commissioners were, as a result, added to the membership of the CKRC.

At the time of the merger, the PCK had held hearings in all but one province and had collected a large number of views and recommendations from organized groups and individuals. The CKRC on its part had set up an elaborate committee system, most of which had met several times to discuss programmes for Civic Education, publicity, research and drafting, while the finance committee had negotiated allowances for commissioners and begun the purchase of vehicles. The Commission benefited greatly from synergy once the two groups merged.

Once the Commissions had merged the unified Commission began its work in earnest and collected views throughout the Republic of Kenya through hearings held in all the 210 Constituencies and with numerous targeted groups not to mention written memoranda which formed the basis of a comprehensive Report and a draft Constitution which was released on the 19th day of September, 2002 and popularly known as 'Ghai or CKRC Draft.'

Pursuant to the provisions of the Constitution of Kenya Review Act⁸⁰ the CKRC went through the process of having 629 Delegates⁸¹ including 223 elected and nominated Members of Parliament and

80 Chapter 3A of the Laws of Kenya.

81 The Conference Delegates were elected pursuant to Section 27 of and 34 and Regulations made thereunder being: -

- (a) The Constitution of Kenya Review (Constitution of National Constitutional Conference) Regulations, 2002.
- (b) The Constitution of Kenya Review (District Representatives Elections) Rules, 2002.
- (c) The Constitution of Kenya Review (Nomination of Civil Society and Other Interest Groups' Representatives) Rules, 2002.

the Speaker empanelled for the National Constitutional Conference which was scheduled to commence on the 28th day of October, 2002 at the Bomas of Kenya in Nairobi. However, this was not to be because the then President Daniel Arap Moi dissolved Parliament on the 27th day of October, 2002 thus disrupting the Constitution making process. The 2002 General Elections were therefore held under the old constitutional dispensation during which a new political outfit, the National Rainbow Coalition – (NARC) campaigned on the platform of delivering a new Constitution within a hundred (100) days of winning the elections.

Following the effective disintegration of the NARC government three months after inception, the exercise of Constitution-writing proved to be even more elusive. Although NARC reconvened the NCC, the political differences among the various factions of NARC soon led to the collapse of the *Bomas* process.⁸² Nonetheless, a section of the NARC government later prepared ‘A Proposed New Constitution of Kenya (2005)’ (*Wako* draft). This was taken to a referendum on 21 November 2005 but was subsequently rejected by a majority of Kenyans.⁸³ The issue of constitutional review was never visited until in the mediation process in the aftermath of the 2007 elections violence. In its agenda no. 4, the Kenya National Dialogue Reconciliation Committee (KNDRC) agreed on the need for comprehensive constitutional reforms as an inevitable transitional measure. Other transitional justice measures agreed upon under Agenda no. 4 as long term solutions to the violence include the establishment of a Truth, Justice and Reconciliation Commission (TJRC), prosecution of alleged perpetrators, and institutional reforms.

Given the contentious nature of prosecution and the political uncertainty over the TJRC, constitutional reforms appear to have won much political support of all the other transitional mechanisms. This goodwill saw the enactment of two cardinal legislations: The Constitution of Kenya Review Act (2008) and The Constitution of Kenya (Amendment) Act (2008). While the latter legislation sought

82 The preliminary report of the committee of experts on constitutional review issued on the publication of the Harmonised Draft Constitution (2009) 12.

83 As above

to entrench in the Constitution the political agreements arrived at in the KNDRC, the former was keen to facilitate the completion of the constitutional review process. In the main, the Act provided the legal framework, the conduit through which Kenya would eventually attain a new Constitution. The object and purpose of the legislation was to:

- Provide a legal framework for the review of the Constitution of Kenya;
- Provide for the establishment of the organs charged with the responsibility of facilitating the review process;
- Establish mechanisms for conducting consultations with stakeholders;
- Provide a mechanism for consensus-building on contentious issues in the review process; and
- Preserve the materials, reports and research outputs gathered under the expired Act.

The Act established a number of organs to facilitate the review process, a key player being the Committee of Experts (COE).⁸⁴ The functions of this body were to:⁸⁵

- Identify the issues already agreed upon in the existing Draft Constitutions;
- Identify the issues which were contentious or not agreed upon in the existing Draft Constitutions;
- Solicit and receive from the public written memorandum and presentations on the contentious issues;
- Undertake thematic consultations with caucuses, interest groups and other experts;
- Carry out or cause to be carried out such studies, researches and evaluations concerning the Constitution and other Constitutions and constitutional systems;
- Articulate the respective merits and demerits of proposed options for resolving the contentious issues;
- Make recommendations to the Parliamentary Select Committee on the resolution of the contentious issues in the context of the greater good of the people of Kenya;
- Prepare a harmonised Draft Constitution for presentation to the National Assembly;

84 Constitution of Kenya Review Act, s 5.

85 As above, s 23.

- Facilitate civic education in order to stimulate public discussion and awareness of constitutional issues;
- Liaise with the electoral management body to hold a referendum on the Draft Constitution; and
- Do such other things as are incidental or conducive to the attainment of the objects and principles of the review process.

Thus, the Act provided the people of Kenya an opportunity to ‘actively, freely and meaningfully participate in generating and debating proposals to review and replace the Constitution.’⁸⁶ In addition, the Committee of Experts was required to convene a reference group of thirty representatives chosen by identified interest groups.⁸⁷ A referendum was the ultimate opportunity for the ordinary people to reject or accept the proposed Constitution.⁸⁸

As noted above, the Review Act established a CoE whose mandate was to identify contentious issues and to propose solutions to them and also to harmonise agreed issues. This led to the development of the Harmonised Draft Constitution that was subsequently discussed by the PSC and duly accorded parliamentary approval. It is instructive to note, however, that numerous contentious issues arose with respect to various aspects of the harmonised draft. These included the provisions relating to executive powers, devolution, the Khadhi Courts and transition measures. Nonetheless, amidst these contentions, the Harmonised Draft Constitution was overwhelmingly voted for in a referendum held on 4 August 2010. Its promulgation into law on 27 August 2010 brought to an end Kenya’s long journey in search of a new constitutional dispensation.

5 CONCLUSION

Like most nascent democracies, Kenya’s constitutional history portrays the most difficult hurdles that such democracies must surmount as they walk the path of acquiring a viable constitutional dispensation. Constitutional developments in Kenya have been characterised by a dis-interested political class that has perpetually

86 As above, s 6.

87 As above, s 31.

88 As above, Part V of the Act.

sought to strengthen their grip at political power while the inert ethos of constitutionalism are relegated to the periphery. Constitutionalism has seldom informed the social, economic and political decisions made by the political class. Besides, the sanctity of the Constitution is often disregarded through disobedience of constitutional principles coupled with constant mutilation of the document.

Even where attempts have been made towards a new constitutional order, efforts have variously been exerted to ensure that either the resultant documents are so dilute or the spirit of the drafters is never accomplished. This was effected in three major ways. First was by amending the existing Constitution. While this may have been beneficial to the citizenry in a number of instances, it was, to a large extent, moulded to serve the whims of the 'political elites.' Second was through blatant disrespect of the Constitution itself and third, was through frustration of constitutional reform processes. That history offers a disturbing account of the process of Constitution-making in Kenya is thus a fact that cannot be over-emphasised.

Nonetheless, all efforts cannot be said to have yielded to naught because, despite these challenges, the country now has a new Constitution that was written by its own people. This chapter is, however, not too naïve to suggest that the acquisition of a new Constitution is an end in itself. Rather, the end will be achieved by entrenching a constitutional dispensation that upholds the rule of law, separation of power, respect of fundamental rights of the citizenry and a pro-active judiciary that safeguards all these gains. In a nutshell the journey from the Egypt of the Old Constitution to the Canaan of Constitutionalism has just begun.

CHAPTER TWO

CONSTITUTIONALISM AND THE RULE OF LAW UNDER THE NEW CONSTITUTIONAL ORDER

DENNIS BEN MOSOTA[★]

1 INTRODUCTION

On 27 August 2010, Kenya found herself with a realistic chance of putting in place a new and improved constitutional dispensation. While the new order, seen by a wide majority as an expression of their wishes, is expected to deal with the question of ethnic diversity— culture, language among others— in a very substantial way, and put in place a framework for sharing of resources, many daunting challenges and obstacles threaten its promise for a better Kenya. These impediments include lack of constitutionalism, diminished space for the rule of law, ethnicity and the attendant problems of conflict and political disquiet. These conflicts appear to be the inevitable consequence of unresolved political and economic contradiction behind an overtly partisan political system. This system seems to place a higher premium on ideological or sectional interests at the expense of national interests.

Management of these concerns against the twin prisms of constitutionalism and the rule of law are important in understanding democratic governance of a country. However, in common discourse, the duty of ensuring these two conceptions does not rest with the State alone, but also with the help of other statutory and non-statutory institutions in a civilised society. What then should be done under the new constitutional dispensation? How, and what should Kenya as a country do in response to the challenge of legitimacy, noting that a substantial portion of the electorate opposed, or voted against the Constitution in the referendum held on 4 August 2010?

[★] LLB (Makerere); Dip. Law (KSL). Mosota is an Advocate of the High Court of Kenya based in Nairobi.

This chapter reassesses the presupposition of constitutionalism and the rule of law under the new dispensation, and argues the need for a minimum threshold of legitimacy for the two concepts to be mainstreamed in the national psyche. Looked at against the Constitution-making process in Kenya and the politics that revolved around the process, this inevitably requires subsequent (re) consideration and review of dissentient voices in a pre-determined and universally acceptable framework. This invariably is a delicate process fraught with compromise and deal-making, which if not shepherded objectively, might just push the country back to the situation it found itself in before the Constitution-making process began.

The times have ensured that there are internal and external factors inspiring a resurgence of interest on the related issues of legitimacy, rule of law and constitutionalism. Internally, competing claims to recognition by a variety of excluded and oppressed groups have challenged some of the old stories about democratic Constitution-making process. Whatever view one takes of the substantive issues in the process, it is evident that this is an important time on the debate of the issues above. The maintenance of national unity and the enjoyment of fundamental human rights are exigent upon the adequate solutions to the various religious, political, social and other tensions that have characterised the process of Constitution-making in Kenya. To ignore them would therefore be to neglect an important aspect of contemporary reality.

2 CONSTITUTIONALISM IN THE NEW CONSTITUTIONAL DISPENSATION

The inherited concept of constitutionalism that Kenya has is the doctrine that governments must act within the constraints of a known Constitution whether it is written or not. It is a notion of a government tied to an ordered framework of impersonal laws. This concept has its roots in the seventeenth century struggle between monarchist support for the doctrine of the divine right of kings and parliament, and the judiciary's assertion of the primacy of a system of authority based on law. Since then, the concept has been put

to use in a diverse range of ways depending on particular societal contexts.

The concept of constitutionalism faces two directions at the same time. This is precisely because constitutionalism implies both a foundational act and an ongoing process of contestation.¹ One is always a backward-looking historical fact of the founding act and the other is the normative task of continuing interpretation. As much as the concept has a grand historical legacy, it is also an often mundane day-to-day activity. In other words, it is the basis of an intricate web of lived experiences and human interactions. Rather than merely being a static exercise in historical retrieval, constitutionalism is an ongoing process which each new generation engages in and necessarily alters in the process of such engagement. It is no longer best viewed exclusively as a means of limiting or controlling power; for it is itself constituted by democratic struggles.

Constitutions are essentially meant to regulate or limit state power. A Constitution is, however, more than just a set of rules or laws regulating society and government. 'It is an expression of the general will of a nation, [the sum total of] its history, fears, concerns, aspirations, vision, and indeed, the soul of that nation.'² Unfortunately, Constitutions in Africa have for long been seen merely as legislation that legitimise executive action and establish the supremacy of the state over society. This emphasis on legal constitutionality or juridical constitutionality has undermined the essence of constitutionalism. Applying this warped notion of constitutionalism, many African states have used Constitutions to legitimise authoritarian rule.³ For example, the repealed Kenyan Constitution was amended so extensively to the point that it no longer reflected the values and principles on which it was founded.⁴ It is, therefore, critical that

1 C Harvey, J Morison and J Shaw 'Voices, spaces and processes in constitutionalism' (2000) 27 *Journal of Law & Society* 2.

2 Common Wealth 'Promoting a culture of constitutionalism and democracy in Common Wealth Africa' (1999) Background Paper to accompany Chri's recommendations to CHOGM 99.

3 As above 2 & 3.

4 G Kuria 'The Constitutional implications of East African Cooperation' in K Kibwana (ed.) *Human rights and democracy in East Africa: The Constitutional Implications of East Africa cooperation* (1997).

this chapter interrogates the concept of constitutionalism before proceeding to assess the state of constitutionalism in Kenya.

Constitutionalism is broader in its spread and indeed includes the rule of law. Like the rule of law, however, constitutionalism is beset by various competing conceptions, ranging from conservative liberal to radical social democratic and even post-modern humanistic. There is a fundamental agreement in what constitutes constitutionalism, and in its restatement by Smith:⁵

Constitutionalism is practiced in a country where the government is genuinely accountable to an entity or organ distinct from itself where elections are freely held on a wide franchise at frequent intervals, where political groups are free to organise in opposition to the government in office and where there are effective legal guarantees of fundamental civil liberties enforced by an independent judiciary.

Constitutionalism is, therefore, the practice of politics in accordance with the Constitution— a collection of written or unwritten fundamental rules and principles that restrain the government (and other political actors) from exercising arbitrary power. A Constitution gears the exercise of political power toward the satisfaction of the citizens' socio-political and economic needs. Although well nigh all modern states have written Constitutions, not all governments can be said to be constitutional. Central to its contemporary existence is a belief that power has to be balanced, accountable, rational, humane and exercised not simply with the consent, but with the active involvement of those subject to power's rule.

Constitutionalism is increasingly viewed as the driving force for the attainment of the best form of governance in Kenya. Essentially, it has been described as a 'normative theory' comprising a set of processes and rules that allocate discipline and govern power.⁶ It does so by maximising 'the ideals of freedom and full participation and representation.'⁷ Constitutionalism embraces an aspect of established and limited government, accountable government,

5 S A Smith *The new Commonwealth and its constitutions* (1964).

6 M Maduro 'From constitutions to Constitutionalism: A constitutional approach for global governance' A paper presented at 'Globalisation' conference, University of Sheffield in May 2003.

7 As above.

balanced government, regularised government, individual protection, removal of unjustifiable discrimination, responsive government, and democratic government. It relates more to pragmatic rationalism and contextual sensitivity on the best way to temper public power in a situation in which people find themselves. The values and principles of constitutionalism are not universally true in any one interpretation or instantiation. They have to be applied and developed in widely differing social contexts—local, regional, national and supranational and in differing forms of governance. Constitutionalism and the rule of law do not only embody the values of a pre-existing society; they produce values which transcend historical and social contingencies and which shape political development and which in turn are shaped by that development.

It has long been realised that public power is not the exclusive form of power, a point that has been used to undermine both the claims for, and achievements of, constitutionalism. In other words, significant forms of power operate outside government to such an extent that they pose a serious threat to the rule of law and constitutionalism. Kenya carries this baggage with her as a feature of rational democratic governance. She knows what constitutionalism and the rule of law entail and that the devil is in the detail. She also knows that promises of good governance have for long remained unfulfilled; that law in the books and law in action are two very different things; that the outcome of many legal disputes is very uncertain and that many exercises of power are not controlled by rules known beforehand and that regulation by law gives way to administration, self regulation, negotiation and compromise. All in all, constitutionalism provokes a quest that can never be satisfied but which nonetheless must not be avoided.

3 THE QUESTION OF LEGITIMACY

This chapter acknowledges that the question of legitimacy is a prerequisite for any of the lego-political concepts to hold, and therefore interrogates it. Political legitimacy is a virtue of political institutions and of the decisions—about laws, policies, and candidates for political office—made within them. First, how should legitimacy be defined? Is it primarily a descriptive or a normative concept?

If legitimacy is understood normatively, what does it entail? Some associate legitimacy with the justification of coercive power and with the creation of political authority. Others associate it with the justification, or at least the sanctioning, of existing political authority. Authority stands for a right to rule—a right to issue commands and, possibly, to enforce these commands using coercive power.

Constitutions are premised on the acceptance of state power as legitimate. If strife exists on the ground or the government is not accepted by the people, then the Constitution may become a 'façade' Constitution. A facade Constitution can declare aspirational principles and adopt power structures for government. But such provisions and principles are ineffective and potentially delegitimised because they are not followed in practice. A central argument pursued in this chapter seeks to accord primacy to the argument that while the constitution-making process in Kenya may have been within some prior defined lego-political framework, a distinction must be drawn between the legitimacy of origin and the legitimacy of exercise. While the former is based on the source of power, the latter pertains to the way in which this power is employed. Each of these types of legitimacy plays a different role,⁸ and the latter is predicated on constitutionalism.

A Constitution without legitimacy is no Constitution at all. It is outside the law in the sense that it ought to be respected by the community against which it is applied. Legitimacy is a function of shared values which, in turn serve as the foundation of constitutionalism. It has once been argued that the core question of constitutionalism is the process and substantive components of governmental structuring uniquely suited and appropriately expressed by a singular community composed of unified demos/ethnos.⁹ Most foundational articles about constitutionalism, as a national or international normative structure, quickly more than the nature of the concept (its institutional parameters) to the scope of

8 For a comprehensive dichotomisation, see J D'Aspremont 'The legitimacy of governments in the age of democracy' (2005–2006) 38 *New York University Journal of International Law & Policy* 880.

9 K Pistor & P A Wellons *et al* *The role of law and legal institutions in Asian economic development: 1960-1995* (1996).

its legitimate parameters. Among the more powerful of iterations of this approach:

Constitutionalism entails a sufficiently shared willingness to use law rather than force to resolve disagreements; to limit government power and to protect human rights through law and defined processes; to provide a reasonable degree of predictability and stability of law that people may rely on as they structure their lives; and to maintain a government that is legitimate and effective enough to maintain order, promote public good, and control private violence and exploitation.¹⁰

Historically, legitimacy was associated with the state and institutions and decisions within the state. The contemporary literature tends to judge this as too narrow, however. This raises the question how the concept of legitimacy may apply, especially in a new constitutional dispensation, approved by a narrow electoral majority.

If legitimacy is interpreted descriptively, it refers to people's beliefs about political authority and, sometimes, political obligations. In his sociology, Max Weber put forward a very influential account of legitimacy that excludes any recourse to normative criteria.¹¹ According to Weber, that a political regime is legitimate means that its participants have certain beliefs or faith (*Legitimitätsglaube*) in regard to it. This, 'the basis of every system of authority, and correspondingly of every kind of willingness to obey, is a belief, a belief by virtue of which persons exercising authority are lent prestige.'¹² Weber distinguishes among three main sources of legitimacy— understood as both the acceptance of authority and of the need to obey its commands. People may have faith in a particular political or social order because it has been there for a long time (tradition), because they have faith in the rulers (charisma), or because they trust its legality, specifically the rationality of the rule of law.¹³ Weber identifies legitimacy as an important explanatory

10 V C Jackson 'What is in a name? Reflections on timing, naming, and Constitution-making' (2008) 49 *William & Mary Law Review* 1254.

11 M Wolfgang *The political and social theory of Max Weber* (1989).

12 M Weber 'Politics as a vocation' in H H Gerth and C W Mills (eds.) *From Max Weber: Essays in Sociology* (1948).

13 As above.

category for social science, because faith in a particular social order produces social regularities that are more stable than those that result from the pursuit of self-interest or from habitual rule-following.¹⁴

In contrast to Weber's descriptive concept, the normative concept of political legitimacy refers to some benchmark of acceptability or justification of political power or authority and, possibly, obligation. On the broadest view, legitimacy both explains why the use of political power by a particular body, be it a state, a government, or a democratic collective, is permissible and why there is a *pro tanto* moral duty to obey its commands. On this view, if the conditions for legitimacy are not met, political institutions exercise power unjustifiably and the commands they might produce do not then entail any obligation to obey. John Rawls, in *Political Liberalism*,¹⁵ presents such an interpretation of legitimacy.

One widely held, albeit narrower, view links legitimacy to the moral justification—not the creation—of political authority. Political bodies such as states may be effective, or *de facto*, authorities, without being legitimate. They claim the right to rule and to create obligations to be obeyed, and as long as these claims are met with sufficient acquiescence, they are authoritative. Legitimate authority, on this view, differs from merely effective or *de facto* authority in that it actually holds the right to rule and creates political obligations.¹⁶ According to an opposing view,¹⁷ political authority may be morally justified without being legitimate, but only legitimate authority generates political obligations. However, legitimate authority, in itself without more, is not sufficient to create political obligations. The thought is that a political authority (such as a state) may be permitted to issue commands that citizens are not obligated to obey.¹⁸ Based on a view of this sort, some have argued that legitimate authority only

14 T Parsons (ed.) *The Theory of Social and Economic Organisation* (1964).

15 R. John *Political liberalism* (1993).

16 R. Joseph *The morality of freedom* (1986).

17 See for example, S A John *Justification and legitimacy: Essays on rights and obligations* (2001).

18 R. Dworkin *Law's empire* (1986).

gives rise to political obligations if additional normative conditions are satisfied.¹⁹

There is sometimes a tendency among scholars to equate the normative concept of legitimacy with justice. Some explicitly define legitimacy as a criterion of minimal justice.²⁰ Unfortunately, there is sometimes also a tendency to blur the distinction between the two concepts, and a lot of confusion arises from that. Someone might claim, for example, that while political authorities such as states are often unjust, only a just state is morally acceptable and legitimate in this sense. Rawls²¹ offers an account of how the two concepts come apart. In his view, while justice and legitimacy are related in that they draw on the same set of political values, legitimacy makes weaker demands than justice. That is to say, political institutions may be unjust but legitimate. This can easily be understood within the context that, because legitimacy relates primarily to political institutions, it is satisfied more easily than justice, which relates to the full set of social and economic institutions.

Having distinguished between the descriptive and normative conceptualisations of legitimacy, we should note that some authors have argued for a concept of legitimacy that combines descriptive and normative elements.²² They criticise the usefulness of the descriptive concept as defined by Weber for neglecting people's second order beliefs about legitimacy—their beliefs, not just about the actual legitimacy of a particular political institution, but about the justifiability of this institution, that is, about what is necessary for legitimacy. According to Beetham, a 'power relationship is not legitimate because people believe in its legitimacy, but because it can be justified in terms of their beliefs.'²³ They also criticise the strictly normative concept for being of only limited use in understanding actual processes of legitimation. The charge is that philosophers tend

19 W Christopher 'Liberalism, Samaritanism, and political legitimacy' (1996) 25/3 *Philosophy and Public Affairs* 211–237; E A William *Three anarchical fallacies* (1998); A Buchanan and R O Keohane 'The legitimacy of global governance institutions' (2006) 20/4 *Ethics and International Affairs* 405–437.

20 Buchanan and Keohane (n 19 above).

21 John (n 15 above).

22 H Jürgen *Moral consciousness and communicative action* (1990).

23 D Beetham *The legitimation of power* (1991).

to focus on the general conditions necessary for the justification of political institutions, but neglect the historical actualisation of the justificatory process. In Jürgen Habermas' words:²⁴

Every general theory of justification remains peculiarly abstract in relation to the historical forms of legitimate domination. ... Is there an alternative to this historical injustice of general theories, on the one hand, and the standardlessness of mere historical understanding, on the other?

The constitutional rules that most African countries adopted at independence did not have the legitimacy, which according to Sundhaussen,²⁵ usually derives from the 'understanding and voluntary acceptance of the Constitution by the people as a prescription for settling conflict within society.' Hence, while these Constitutions were legal instruments, they lacked legitimacy. Why did these Constitutions not reflect the values of the relevant stakeholders, and their cultures and traditions? It was inevitable that these rules would fail to reflect the values of the people to be governed by them. For one thing, Constitution-making at this time was top-down, elite driven and not participatory. The process was not democratic, bottom-up or people driven. The rules were designed externally. In fact the process was usually undertaken at a location in the métropole and imposed on the Africans. First, most of the emerging countries based their Constitutions on European models, producing rules that did not reflect the realities or specificities of the colony in question.

It is true that borrowing ideas from other countries and cultures was not the continent's main problem. The critical issue was that these models did not reflect the values of the relevant stakeholder groups (i.e., the people whose lives would be governed by the rules selected.²⁶ Perhaps, more important is the fact that Africans were deprived of the opportunity to determine their own laws and institutions. Second, the process was elite-driven and not participatory. It was dominated by the colonial state, the resident

24 Jürgen (n 22 above) 205.

25 U Sundhaussen 'Democracy and the middle classes: Reflections on political development' (1991) 37 *The Australian Journal of Politics and History* 108.

26 V T LeVine 'The fall and rise of constitutionalism in West Africa' (1997) 35 *The Journal of Modern African Studies* 181–206.

European economic and commercial class, and a few indigenous urban elites. Third, as stated earlier, the constitutional conferences were usually held in the métropole and away from the people, with the latter's interests represented by an opportunistic urban elite, which had been captured by European culture and value system. Only in rare instances were these elites elected by the people; usually they were appointed by the colonial state, based on their willingness to establish a post-independence political and economic structure that would actually enhance the ability of the departing Europeans to have adequate access to the resources of the former colony.²⁷

Fourth, in many cases, especially in the French colonies, the final document was a thinly disguised version of the Constitution of the new country's former coloniser. Finally, little or no effort was made to seek out the opinion of the people regarding governance and resource allocation or peaceful coexistence (i.e., the management of ethnic diversity), nor were the people given an opportunity to examine the final document thoroughly and provide the constitutional committee with feedback that could be used to improve the document.²⁸

4 RULE OF LAW IN THE NEW CONSTITUTIONAL DISPENSATION

No concept in legal discourse is more contested than that of the Rule of Law. The Rule of Law is a component of constitutionalism and both feature as legitimating pillars of the Kenya's new Constitution. Arguably, the idea behind Kenya's Constitution-making process was to reclaim its place in the community of nations that stake out a claim to the rule of law. This section, therefore, seeks to examine the rule of law within the context of the country's new constitutional dispensation. Indeed, the effort to produce a new Constitution was driven by the imperatives of constitutionalism and the rule of law. These two concepts vividly emerge as essential values of the new Constitution.

27 As above.

28 J M Mbaku 'Constitutionalism and governance in Africa' (2004) 6 *West Africa Review*.

It is recognised that Kenya's transition to democracy is taking place under difficult and somewhat uncertain circumstances. Besides the weak economy, there is an acute crisis of confidence in the institutions and structures left behind by the repealed Constitution. Consequently, the judiciary, executive and the legislature have remained the subject of negative public scrutiny and opprobrium. The patience of the electorate is at its lowest ebb. Ethnic and religious differences have broken out in the country. Poverty and unemployment are high, further undermining stability. While grappling with enormous challenges such as addressing past human rights violations, providing justice to previously marginalised groups and addressing social and economic injustices stemming from structural injustices and inequalities that are often the causes of conflict, the country faces the further challenge of articulating the vision of a new society. Additional challenges include establishing effective governance structures, defining the fundamental principles by which the country will be governed, distribution of power within the country among the various segments of the population, engaging in effective reconstruction and economic development, and establishing and securing enduring peace.

It is difficult for the country to move forward without coming to terms with the past. Many want justice for past human rights abuses and a public accounting for the corruption and abuse of power that ruined the national economy. They also want the government to move forward in charting a framework through which Kenya can reclaim its place in the community of nations. To do this means addressing the fundamental conditions of the country's politics, economy, legal system and society. Kenya is struggling to find the balance between the preservation of the state and preserving, protecting and advancing the rights of its people. The 'people' have identities as individuals, as men and women, as members of interest groups, as members of religious and ethnic communities and as members of regions. These identities run concurrently. People and communities have political, economic and social rights that must be recognised, and they must be able to enjoy the benefits of these rights in their daily lives.

The new Constitution has rightly extolled the place of the rule of law in Kenya by subjecting the country to a level of judicial scrutiny. Provisions that promote individuals' protection under the law and facilitate their unlimited access to the court are certainly bound to be the most popular in the new law. The Constitution itself spells out that the Constitution is subject to the powers conferred on it it is a limited entity and one bounded by law. This, invariably, may be seen as a very narrow version of the rule of law and one which concentrates on formalities and not substance. The rule of law is an idea that is subject to the widest of interpretations. These range from purely formalistic accounts of legality on one part, to accounts which see the rule of law as synonymous with a just and fair organisation of social and political relationships on the other. The Constitution hoists the concept to where it assumes vastly different significance among the people; something they should aspire to.²⁹

Hayek's famous invocation of the rule of law has been correctly seen as a legitimator of market relationships, economic individualism and capitalism. To Hayek, the rule of law was only co-extensive with economic individualism.³⁰ Furthermore, the rule of law is often used where 'Law and Order' is meant. The two are not the same. The latter means imposing order and social control where order is lacking. As Johnson said, 'a Constitution is indeed a corset for those who seek power. (...) But constitutional principles are not corsets for the political discourse of a free society; they are the necessary condition for having any discourse at all about how purposes are to be fulfilled in that society.'³¹

The general irreducible minimum content of the rule of law would include the setting of limits to power's all intrusive claims—the supremacy of law and legal process over arbitrary action. This connotes publication of law, control of discretion and power according to published law as interpreted by independent judicial organs, and non-retroactivity of legal effect as a generally desirable thing. It would include the equality of all before the law. Law is blind, or should be blind, to social, political, class, gender, racial,

29 See Preamble of the PNC.

30 F.Hayek *The Road to Serfdom* (1944).

31 N.Johnson *In search of the Constitution* (1994) 147-148.

national or other differences. The maintenance of the rule of law is a 'basic principle' of 'any system of law'; in Kenya, Parliament must be presumed not to legislate contrary to the rule of law. The rule of law enforces minimum standards of fairness, both substantive and procedural.

5 CONCLUSION

As constitutionalism and Constitution-making emerge as the two most important policy issues facing Kenya today, it has become imperative to address certain issues associated with these public policy imperatives. First, it is necessary to deal with the issue of legitimacy. In the past, Constitution-making processes in Africa have been dominated and controlled by urban-based elites, with most of the people (especially historically marginalised groups and individuals) denied participation. The results have been constitutional rules that have failed to reflect the aspirations, values, customs, traditions, and preferences of each country's relevant stakeholder groups. Second, who should initiate the Constitution-making process and when should that be undertaken? Third, what method would be used to engage the people in the process of making the Constitution? Would it, for example, be the national conference or some variant of it? Or would it require a violent grassroots revolution, involving the overthrow of the incumbent regime and the subsequent implementation of a democratic dispensation? Fourth, how would members of the Constitutional Assembly be determined? Fifth, how long should the entire process take? Sixth, will the people consider the final outcome a legitimate instrument for the regulation of their socio-political interaction, especially where it is supported by one half of a country's polity?

Finally, how can one guarantee that the outcome would be institutional arrangements that are relevant to the lives of the people; enhance their ability to use their resources effectively and productively to generate the wealth that they need; provide the wherewithal for the effective management of ethnic diversity; ensure the efficient and equitable allocation of resources; and promote good governance? The manner in which these processes are handled plays a crucial role in the consolidation of peace and the establishment of

an atmosphere conducive to economic growth, development and the emergence of a legitimate and sustainable state. Many of these issues if not handled properly can accentuate existing differences and lead to renewed differences.

As has been pointed out by Ihonvbere³², Constitutionalism and constitutions are not new phenomena in Africa. Notoriously violent and oppressive states such as apartheid South Africa had a Constitution and practiced some form of constitutionalism. Authoritarian regimes and military dictatorships, including those of Sani Abacha in Nigeria, Idi Amin in Uganda, and Jean-Bedel Bokassa in the Central African Republic had Constitutions. Regardless of the claims made by them and their apologists, one can hardly consider these governments to have been practicing genuine constitutional governance and/or constitutionalism. While these so-called Constitutions were legal documents, they were not legitimate instruments of governance. Ihonvbere argues:

this is what makes the difference between the *mere* existence of a Constitution and the *real* existence of a living Constitution, owned by the people that serves as the basis of democratic politics and governance—the difference between constitutions and constitutionalism” (emphasis not supplied).³³

In a divided democratic polity such as the one we find ourselves in, processes aimed at instilling the much required legitimacy can be attained by conducting a disciplined enquiry into the factors for discontent. This process must at a minimum be participatory. For participation to be effectively carried out there must exist an environment that promotes and enhances dialogue, public debate, accommodation, and political give-and-take. The existence of such an environment necessarily enhances peace and promotes democracy. Of course, the decision to allow all relevant stakeholders to participate, implies that the process of addressing these concerns be conducted in a prior defined universally accepted framework, reducing the influence of the state and the ability of the latter's

32 J O Ihonvbere (2003) 'Constitutions without constitutionalism? Towards a new doctrine of democratisation in Africa' in J M Mbaku and J O Ihonvbere (eds.) *The transition to democratic governance in Africa: The continuing struggle* (2003) 139.

33 As above 139-140.

custodians (i.e., civil servants and politicians) to engage in opportunistic manipulation of the process for their own benefit. This requires that non-partisan institutions and the civil society to assume mantleship and lead the process. Perhaps, more important is the fact that if citizens participate in the design of laws, they are more likely to obey them and make sure that they function properly. That should reduce the costs of compliance and significantly improve governance.

Participatory Constitution-making not only produces a compact Constitution that will reflect the tastes and preferences of the people and be considered by them as a legitimate governance tool, but helps develop a culture of the type of constitutionalism that enhances the deepening and institutionalisation of democracy. In this regard, Kanyongolo observes: the 'existence of a Constitution which articulates democratic values and principles is not sufficient for the establishment of the political system which is democratic in practice.'³⁴ A culture of democratic constitutionalism must be created and sustained within the country in order for democracy to be deepened and institutionalised. Participatory Constitution-making sets the stage for the creation and sustaining of such a culture.

Without doubt, constitutionalism and the rule of law have been the common languages in popular pressures for a new constitutional order in Kenya. The menu and impulses for change range from restructuring of government, entrenchment of human rights and social justice, expansion of spheres for public engagement, the independence of the judiciary, devolution of power, on other issues. Of these, constitutionalism and the rule of law are expected to play a key role. But this will only be possible if the new order gains legitimacy from a wider cross-section of the Kenyan society, as opposed to the slight majority that passed the Constitution in the referendum. A reconstituted Kenyan state must then look into the opposing concerns and address them effectively for the sake of peace and unity.

34 F E Kanyongolo 'The Constitution and the democratisation process in Malawi' in O Sichone (ed.) *The state and constitutionalism in Southern Africa* (1998) 2.

CHAPTER THREE

THE BILL OF RIGHTS

MORRIS KIWINDA MBONDENYI*

1 INTRODUCTION: GENERAL STRUCTURE AND SALIENT FEATURES OF THE BILL OF RIGHTS

Kenya's Bill of Rights, entrenched in Chapter Four of the Constitution, is an integral part of the country's democratic governance and is the framework for social, economic and cultural policies.¹ Structurally, the Bill of Rights consists of forty Articles and is divided into five parts, namely: General provisions relating to the Bill of Rights; Rights and Fundamental freedoms; Specific application of rights; State of emergency; and the Kenya National Human Rights and Equality Commission. Arguably, the rationale for sub-dividing the Bill of Rights into various parts was first to guarantee the protection and promotion of substantive rights and freedoms, and secondly to provide for their interpretation and enforcement mechanisms.

The Bill of Rights guarantees the enjoyment of all the three generations of rights: civil and political rights; economic, social, and cultural rights; and group (peoples') rights. Thus the new Constitution is an innovative instrument because some of its fundamental rights and freedoms distinctively depart from those that obtained in the Independence Constitution. For example, the former Constitution made no provision for socio-economic rights. However, although some of the provisions of the current Bill of Rights are different in some way from those of the previous one, it would be an overstatement to describe these differences as autochthonous. The differences merely reflect Kenya's appreciation of the current trends and developments in international protection of human rights.

* LLD, LLM (University of South Africa); LLB, Moi University. Dr. Morris Kiwinda Mbondeniyi is the Head, Africa Nazarene University Law School, Nairobi, Kenya. He is also a researcher and consultant on international human rights law.

1 See Art 19(1) of the Constitution.

A notable feature of the Bill of Rights is the insertion of a derogation clause that would permit the suspension of certain rights and freedoms in strictly defined circumstances.² There are numerous and significant examples of international instruments that contain an express derogation clause. These include Article 15 of the European Convention on Human Rights, Article 4 of ICCPR and Article 27 of the American Convention on Human Rights.³ At the national level, Constitutions of some countries, such as South Africa, also have these clauses.⁴

From the analysis of some of the above stated human rights instruments, it may be concluded that at least three types of circumstances may permit states to derogate from rights.⁵ These are (i) in the event of an exceptional public danger that threatens the existence of the nation⁶ (ii) during a war or other public danger threatening the life of the nation⁷ (iii) during a war or any other crisis that threatens the independence or security of a state.⁸ Hence, any armed conflict, whether internal or international, may be the basis for such derogation.

The United Nations Sub-Commission on Human Rights echoed the importance of derogation clauses by inviting all states 'whose legislation contains no explicit clause that guarantees the legality of the implementation of a state of emergency, to adopt clauses in accordance with international norms and principles...'⁹ This indicates that international human rights norms attach importance to derogation clauses.

2 See Art 58(6) of the Constitution. See also R. Murray *The African Commission on Human and Peoples' rights and international law* (2003) 123-126; D. Harris, O'Boyle & C. Warwick *Law of the European Convention on Human Rights* (1995) 489-506.

3 See L. Sermet 'The absence of a derogation clause from the African Charter on Human and Peoples' Rights: A critical discussion' (2007) 7 *African Human Rights Law Journal* 143.

4 See Constitution of the Republic of South Africa, 1996, art 37.

5 Sermet (n 3 above) 143.

6 ICCPR, art. 4.

7 European Convention, art 15.

8 American Convention, art 27.

9 Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res1995/33, Question on human rights and states of exception, 35th session, 24 August 1995.

The third notable feature in the Kenyan Bill of Rights relates to its economic and social rights provisions. Arguably, the intention of incorporating this genre of rights in the Constitution was to give effect to some of the rights stipulated in international human rights instruments— such as the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁰ The Constitution's approach is similar to that of the Covenant in that it invokes the incremental language of 'progressive realisation' of this category of rights.¹¹ To augment this position, Article 20(5) of the Constitution categorically states:

In applying any right under Article 43 [relating to economic and social rights], if the state claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles—

- (a) it is the responsibility of the state to show that the resources are not available;
- (b) in allocating resources, the state shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and
- (c) the court, tribunal or other authority may not interfere with a decision by a state organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.

This in itself is a clear indication that the Constitution places the implementation of economic, social and cultural rights on a different footing as opposed to other categories of rights. Noteworthy, however, the economic and social rights provided for in the Constitution are not as detailed as the Civil and Political rights. This raises doubts as to whether the government will take seriously the implementation of this category of rights as it would the other categories.

10 Adopted and opened for signature, accession and ratification by General Assembly resolution 2200 A (XXI) of 16 December 1966; entered into force 3 January 1976 in accordance with art 27.

11 Art 21(2) of the Constitution states, 'the State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.'

Fourthly, the Bill of Rights incorporates ‘group’ rights in its provisions. These groups include children,¹² persons with disabilities,¹³ youth,¹⁴ minorities and marginalised groups,¹⁵ and older members of society.¹⁶ Accordingly, Article 21(3) provides as follows:

All state organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

Fifthly, the Bill of Rights imposes duties on both the state and individuals. Thus, it is founded on the premise that rights and duties exist concomitantly.¹⁷ Its Article 24 stipulates:

A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) ...

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others...

This implies that rights can only make sense in the social and political arena when they are coupled with duties on individuals.¹⁸ Finally, unlike in the previous Constitution, the current Bill of Rights provides for the establishment of an alternative implementation mechanism other than the ordinary court system. Article 59 establishes the Kenya National Human Rights and Equality Commission.

12 Art 53.

13 Art 54.

14 Art 55.

15 Art 56.

16 Art 57.

17 F Viljoen ‘Africa’s contribution to the development of international human rights and humanitarian law’ (2001) 1 *African Human Rights Law Journal* 21.

18 As above.

2 SUBSTANTIVE PROVISIONS OF THE BILL OF RIGHTS

Human rights may be divided into different categories. These are: civil, political, social, economic and cultural.¹⁹ These rights could be enjoyed individually (individuals' rights) or collectively (group or collective rights). Noteworthy, while civil and political rights impose restraints on the exercise of state power and are therefore negative rights, socio-economic rights tend to extend the scope of state activities, translating them into positive rights.²⁰ Human rights are not static because their codification, both nationally and internationally, is an ongoing process. Sometimes they are codified in response to a specific threat or act of repression. An example frequently cited in this regard is freedom of religion, which was codified in reaction to the powerful Catholic Church in Europe and the religious wars and government coercions that the church provoked.²¹

The classification of rights into various categories should not, however, be construed as rigid because, as stated earlier, human rights are interrelated and interdependent.²² Indeed, even the Kenyan Bill of Rights recognises the indivisibility and interrelatedness of rights. In this sense, it embodies all the three categories of rights and guarantees their equal enforcement without any distinction. That way, it underscores the fact that one category of rights cannot survive without the other. What follows therefore is a discussion of these rights.

2.1 RIGHT TO LIFE

Article 26 of the Constitution guarantees the right to life in very precise terms. It begins with affirming this right then proceeds to

19 See this classification in, for example C Aka 'Military, globalisation and human rights in Africa' (2002) *New York Law School Journal of Human Rights* 371.

20 W Eno 'The African Commission on Human and Peoples' Rights as an instrument for the protection of human rights in Africa' (1998) *LLM Thesis University of South Africa* 7.

21 As above.

22 See art 5 of the Vienna Declaration and Programme of Action.

acknowledge that life begins at conception.²³ The Article prohibits arbitrary deprivation of life. Specifically, abortion is expressly prohibited unless, in the opinion of a trained health professional, there is need for emergency treatment. It has been argued, and rightly so, that the right to life is the most fundamental right on the basis of which other rights accrue.²⁴ As a matter of fact, a person cannot claim any other right if his or her right to life has been violated. Due to its importance, some countries have enlisted it as a non-derogable right.²⁵

A critical reading of Article 26(3) leads to the conclusion that, although the Constitution prohibits extra-judicial killing, it does not outlaw the death penalty. It appears that deprivation of life could be justified by either the 'Constitution or other written law.'²⁶ The retention of the death penalty in the Constitution appears to run counter to the current trend in international human rights practice where lesser penalties are meted on capital offenders. This is illustrated by the UN General Assembly's adoption of the 2nd Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR)²⁷ and the general reluctance by those states that have retained capital punishment on their Statute books to exercise it in practice. The African Commission on Human and Peoples' Rights (hereafter the 'African Commission' or 'Commission') has also encouraged this trend by adopting a 'Resolution Urging States to envisage a Moratorium on the Death Penalty',²⁸ which urges all states party to the African Charter on Human and Peoples' Rights

23 Art 26 states, '(1) Every person has the right to life. (2) The life of a person begins at conception. (3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law. (4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.'

24 See O Nmehielle *The African human rights system: Its laws, practice and institutions* (2001) 85.

25 See S Davidson *The Inter-American human rights system* (1992) 262-263.

26 According to art 26(3), 'A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.'

27 Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989. This Optional Protocol was aimed at the abolition of the death penalty.

28 Adopted at 26th Ordinary Session on 15 November 1999, ACHPR/Res. 42(XXVI) 99.

to take all measures to refrain from exercising the death penalty.²⁹ Accordingly, the African Commission:

Urges all states parties ... that still maintain the death penalty to comply fully with their obligations under the treaty and to ensure that persons accused of crimes for which the death penalty is a competent sentence are afforded all the guarantees in the African Charter.... Calls upon all states that still maintain the death penalty to: (a) limit the imposition of the death penalty only to the most serious crimes; (b) consider establishing a moratorium on executions of death penalty; (c) reflect on the possibility of abolishing death penalty.³⁰

The Commission has in several instances attempted to enforce this resolution. For example, it was reported that during the 31st Session of the Commission in May 2002, one Commissioner asked the delegation from Cameroon: 'the death sentence is still in the criminal code but it has been said that for more than 15 years there has been no execution. Are there any efforts to guarantee the right to life and thus abolish the death sentence?'³¹ Vividly, the Commission perceives the abolition of death penalty as a guarantee to the right to life. The importance of the right to life cannot be overlooked, especially within the context of Africa, generally and Kenya, in particular. This is especially because it is one of those rights that have been violated with impunity by successive political regimes which have engaged in endless power struggles and extra-judicial killings.

2.2 EQUALITY AND FREEDOM FROM DISCRIMINATION

Article 27 permits every individual to enjoy the rights and freedoms recognised and guaranteed in the Constitution without distinction of any kind, such as race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience,

29 The African Commission re-stated this position in Communication 240/2001, *Interights et al (on behalf of Mariette Sonjaleen Bosch) v Botswana*, Seventeenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex VII), para 52.

30 'Resolution Urging the State to Envisage a Moratorium on the Death Penalty', adopted at 26th Ordinary Session on 15 November 1999, ACHPR/Res.42(XXVI) 99.

31 R Murray 'The African Charter on Human and Peoples' Rights 1987-2000: An overview of its progress and problems' (2001) 1 *African human Rights Law Journal* 2.

belief, culture, dress, language or birth.³² The exclusion of individuals from enjoying the rights in the Constitution on the basis of any of these distinctions may therefore amount to discrimination. The term ‘discrimination’ means any distinction, exclusion or preference that has an effect of nullifying or impairing equal enjoyment of rights.³³ Although discrimination is a particular form of differentiation, the two concepts are distinct. Discrimination refers to differentiation on subjective criteria like those mentioned in Article 27(4) of the Constitution.

The right to equality and non-discrimination, therefore, does not exclude reasonable measures intended to protect or support individuals who were previously marginalised or historically disadvantaged. Such measures are generally referred to as affirmative action or ‘positive discrimination.’ Differentiation therefore will not amount to discrimination if it is intended to redress imbalances in society and if it does not result in the violation of the right to equality and other associated rights. Article 27(6) of the Constitution captures this position by emphasising that:

To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

Additionally, the state is obliged to ‘take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.’³⁴ This is in the spirit of ensuring that women and men are treated equally and have the right to equal opportunities in political, economic, cultural and social spheres. Overtly, the current Constitution has sought to reverse the trend of discrimination that has over the ages been perpetrated against women.

32 See art 27(4).

33 See Communication 241/2001, *Purohit and Moore v. Gambia*, Sixteenth Annual Activity Report of the African Commission on Human and Peoples Rights (Annex VII) para 61.

34 Art 27(8) of the Constitution.

Discrimination against women in most Kenyan communities is mainly perpetuated by the tendency to uphold certain mundane socio-cultural beliefs and practices. In fact, some practices, such as female circumcision, are harmful and pose a threat to the health of women and the girl-child. Women have also been previously denied equal opportunities when it comes to participation in governance and other public activities. They are in most cases expected to ratify decisions made by their male counterparts without registering any reservations. To reverse this trend, the government should spearhead the initiative to modify those social and cultural patterns that are discriminative against women. This could be achieved by, for example, conducting public education, information and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men. The Constitution has already set the momentum by requiring gender balance in both elective and appointive positions.

In some legal systems, a nexus has been drawn between the right to non-discrimination and human dignity. The African Commission, for example, emphasised that this right should be zealously guarded and forcefully protected 'in accordance with the well established principle that all human beings are born free and equal in dignity and rights.'³⁵ In other words, discrimination undermines a person's dignity by suggesting that he or she is inferior to the rest. Human dignity is an inherent basic right to which all human beings, regardless of their capabilities or disabilities, as the case may be, are entitled to without discrimination. It is therefore an inherent right which 'every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right.'³⁶

The right to equality and freedom from discrimination guarantee equality before the law as well as equal protection and benefit of the law.³⁷ Consequently, it gives no room to any law that

35 *Purohit and Moore v. Gambia* (n 33 above) para 35-38.

36 As above, para 57.

37 See art 27(1) of the Constitution.

is discriminatory either of itself or in its effect. This right would be violated when, for instance, a public authority in the performance of the functions of his office discriminates against any person. The same could be said of a law that treats people in a discriminatory manner in respect of, for example, access to shops, hotels, lodging-houses, public restaurants or places of public entertainment.

2.3 HUMAN DIGNITY

The Constitution recognises the inherent dignity that belies in every person and the right to have that dignity respected and protected.³⁸ The need to respect and protect human dignity is the essence of the human rights discourse. In other words, the ultimate aim of human rights protection is to secure an individual's intrinsic human dignity. By definition, human rights are demands or claims individuals or groups make that are essential for individual well being, dignity, and fulfilment, the deprivation of which may lead to a great affront to justice.³⁹ Accordingly, they stand above the ordinary laws of the land. The right to human dignity may therefore be guaranteed in a number of ways, including affording one the opportunity to freely develop her personality.

2.4 FREEDOM AND SECURITY OF THE PERSON

Article 29 of the Constitution provides:

Every person has the right to freedom and security of the person, which includes the right not to be—

- (a) deprived of freedom arbitrarily or without just cause;
- (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;
- (c) subjected to any form of violence from either public or private sources;
- (d) subjected to torture in any manner, whether physical or psychological;
- (e) subjected to corporal punishment; or

³⁸ See art 28.

³⁹ H Laski *A grammar of politics* (1967) 91-92.

- (f) treated or punished in a cruel, inhuman or degrading manner.

This Article guarantees individuals physical liberty by prohibiting a number of wrongful acts namely, (i) arbitrary deprivation of freedom (ii) detention without trial (iii) subjection to any form of violence (iv) torture (v) corporal punishment (vi) cruel, inhuman or degrading treatment. The wordings of Article 29(a) are indicative of the fact that freedom could be deprived if there is a just cause. What the provision prohibits therefore is the arbitrary deprivation of freedom. Essentially, a person cannot challenge arrest and detention that is conducted with due respect to the existing laws of the country. Similarly, detention without trial is permissible in Kenya, but only during a state of emergency.

Although the Constitution sanctions 'legitimate' deprivation of freedom and detention without trial, it is encouraging to note that it unequivocally prohibits all forms of violence 'from either public or private sources.' This provision appears to outlaw any form of physical or mental violence directed at a person. Personal violence may take many different forms including torture, corporal punishment, sexual abuse, neglect or maltreatment. Article 1 of the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CAT) defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Generally, incidences of personal violence are rampant in Kenya. For example, some parents or guardians use excessive force to discipline their children by resorting to measures which normally lead to their physical or mental harm. Such abhorrent practices have also been reported in some institutions of learning where children

are ‘unreasonably chastised’ in the name of imparting discipline. Further, some cultural practices, such as circumcision of children without their consent, may also be classified as personal violence, torture or abuse. Traditional circumcision exposes children to untold psychological suffering and often ends in physical torture. In this time and age of anaesthetics, it is perturbing to see children being exposed to painful and horrific experiences in the name of traditional circumcision rites.

The scope of personal violence may also extend to domestic or gender-based violence. This is a form of violence that is directed at persons, especially women, by virtue of their perceived ‘inferior’ gender. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. According to the Committee on the Elimination of all forms of Discrimination Against Women (CEDAW), there is a close nexus between violence against women and gender-based discrimination. This is because, in its General Recommendation no. 19, the Committee was emphatic that:

... The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty....⁴⁰

This partly explains why the international community has lately embarked on concerted efforts to prohibit violence against women. For instance, after the 1993 World Conference on Human Rights held in Vienna, the UN Assembly adopted the ‘Declaration on the Elimination of Violence Against Women’ (DEVAW).⁴¹ The declaration recognised that women experience violence, not only in the family and community, but also through the state and its agencies.⁴² The declaration envisages the adoption of a multi-agency

40 See General Recommendation 19, UN Doc A/44/38 (1990) para 6.

41 Declaration on the Elimination of Violence Against Women, GA Res 48/104 of 20 December 1993. See H Charlesworth & C Chinkin *The boundaries of international law* (2000) 12-14.

42 Declaration on the Elimination of Violence Against Women (note 41 above) art 2.

approach to tackling violence against women, involving both states and Non-Governmental Organisations (NGOs).⁴³

Another remarkable initiative by the international community in this regard was the appointment of the UN Special Rapporteur on violence against women in 1994.⁴⁴ The rapporteur has done a tremendous job in documenting instances and causes of violence against women.⁴⁵ Further, in 1995, the 'Beijing Declaration and Platform for Action' was adopted, identifying violence against women as one of the 12 areas of gross concern.⁴⁶ The document enjoined states in the strategy to prevent violence against women within their respective societies.⁴⁷ A subsequent review conducted on the implementation of the 'Beijing Declaration and Platform for Action' revealed that commendable progress had since been made in recognising violence against women as a form of human rights violation.⁴⁸

Africa, as a region, has also attempted to address the issue of violence against women. For instance, in 2004, the AU adopted the 'Solemn Declaration on Gender Equality in Africa', which proscribes violence and abuse against women and girls, particularly during armed conflicts.⁴⁹ The declaration, save for the fact that it has no binding legal force, is a pointer towards the right direction in tackling sexual assault committed in the context of armed conflicts.

43 As above, art 4.

44 See United Nations Commission on Human Rights Resolution 1994/45 on the question of integrating the rights of women into human rights mechanisms of the UN and the elimination of violence against women, adopted on 4 March 1994.

45 See, for example, Special Rapporteur on Violence Against Women in the Family E/CN.4/1996/53 and E/CN.4/1999/68; Special Rapporteur on Violence against women perpetrated or condoned by the state during times of armed conflict (1997-2000) E/CN.4/2001/73; and Special Rapporteur on Violence Against Women Cultural practices in the family that are violence towards women E/CN.4/2002/83.

46 'Beijing Declaration and Platform for Action' para 44, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995).

47 As above, Strategic Objective D1.

48 See Beijing + 5 Outcome Document reproduced in United Nations *Beijing to Beijing + 5: Review and appraisal of the implementation of the Beijing Platform for Action* (2001) 195, section D para 13.

49 'Solemn Declaration on Gender Equality in Africa', Assembly/AU/Decl 12 & 13 (III), Assembly of Heads of State and Government 3rd Ordinary Session 6-8 July 2004, Addis Ababa.

It is sad to note that during armed conflicts, sexual violence against women is usually perpetrated, 'either as an encouragement for soldiers or as an instrument of policy.'⁵⁰ However, little has been done over the years to curtail the rising incidences of war-related sexual violations. It was not until the creation of the International Criminal Tribunal for the former Yugoslavia (the ICTY) and later, the International Criminal Tribunal for Rwanda (the ICTR), that these crimes received international attention.⁵¹

At least, the two tribunals have sent a signal that wartime abuses against women will henceforth be rigorously prohibited, prosecuted and punished.⁵² Be that as it may, cases of violence against women are still prevalent in Africa as a whole, in times of peace as in times of war. This is a clear indication that a colourful normative framework on this subject is not any meaningful if the same is not diligently implemented to the letter.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa⁵³ (hereafter 'the Women's Protocol' or 'the Protocol') gives an interesting scope to the protection against violence. The Protocol enlists 'unwanted or forced sex' as a form of violence against women.⁵⁴ However, it is not clear whether the drafters had 'marital rape' in mind when framing this provision. This has led to the contention that, since the provision suggests that violence may take place 'in private or public', there is a strong indication that unwanted or forced sex may as well be committed

50 T Meron 'Rape as a crime under international humanitarian law' (1993) 87 *American Journal of International Law* 424.

51 See K Askin 'Sexual violence in decisions and indictments of the Yugoslav and Rwandan Tribunals: Current status' (1999) 93 *American Journal of International Law* 101.

52 N Pillay 'The advancement of women's rights' (2002) 16 *Occasional Paper* Centre for human rights University of Pretoria.

53 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003.

54 Art 4(2)(a). This provision requires states parties to take appropriate and effective measures to 'enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public.'

between spouses in the privacy of their homes.⁵⁵ Accordingly, this implies that states parties to the Protocol are expected to introduce the crime of 'marital rape' in their statute books.⁵⁶ However, it is generally difficult to prosecute this crime, especially because it involves the privacy and sanctity of the marriage institution. It has therefore not been easy for legal systems to formulate watertight legislation on this crime, without being seen to be interfering with the privacy of the marriage institution.

To give effect to the right to freedom and security of the person, it is imperative for the government to undertake not only educative programmes on this right but also some protective measures, including, the establishment of special monitoring units to monitor the implementation of this right. Additionally, non-governmental actors can also initiate measures such as identification, reporting, investigation and follow-up of instances of violation of this right.

2.5 SLAVERY, SERVITUDE AND FORCED LABOUR

Article 30 of the Constitution guarantees protection from slavery or servitude and forced labour. Slavery is an age-old practise that has been evolving with time to take different forms. According to historians, slavery was institutionalised in Africa when the continent began to interact with Islamic jihadists, Arab merchants and later Euro-American slavers and imperialists.⁵⁷ In the seventh century, the continent experienced successive waves of military assault, massive destructions and killings. As soon as the Arab traders arrived in Northern Africa, they began to organise military expeditions and slave raids into the Southern regions of Morocco and as far south as the boundaries of Ancient Ghana. It is reported that on several occasions, they unleashed persecution, summary execution, illegal expulsion and arbitrary arrests on the inhabitants of those areas in the name of 'hunting' for slaves.⁵⁸

55 F Banda 'Building on a global movement: Violence against women in the African context' (2008) 8 *African Human Rights Law Journal* 13.

56 As above.

57 E Alemika 'Protection and realisation of human rights in Africa' in A Kalu & Y Osinbajo *Perspectives on human rights* (1992) 153.

58 As above.

Perhaps, it is on the basis of the fact that slavery is a dehumanising practice that the Constitution seeks to abolish it. Slavery has been one of the greatest violations of human rights ever to be committed in Africa and on Africans. Slavery and servitude in their contemporary forms include practices such as: illegal sale and traffic in human beings, pledging of young girls for debts, forced marriages in exchange of dowry; use of domestic servants for extremely low pay; child labour; and forced labour.⁵⁹ Article 2 of the ILO Convention (no. 29) Concerning Forced or Compulsory Labour⁶⁰ defines forced labour as follows:

1. For the purposes of this Convention the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.

2. Nevertheless, for the purposes of this Convention, the term forced or compulsory labour shall not include—

- (a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character;
- (b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;
- (c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;
- (d) any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;
- (e) minor communal services of a kind which, being performed by the members of the community in the direct interest of

59 E Ankumah *The African Commission on Human and Peoples' Rights* (1996) 119.

60 Adopted by the General Conference of the International Labour Organisation on 28 June 1930; entered into force on 1 May 1932.

the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.

Statistics indicate that at least 12.3 million people around the world are trapped in forced labour.⁶¹ The victims, who are mostly women and girls, are usually forced into prostitution, trapped in debt bondage, or are farm workers kept there by illegal tactics and paid little or nothing.⁶² Unfortunately, the problem presented by the provisions of Article 30 relating to slavery and forced labour is that of enforcement. Modern day slavery, in particular, is a violation that cannot easily be traced to states because it is mostly perpetrated by individuals.⁶³ It is often rooted in traditional and religious practices.

2.6 PRIVACY

The Constitution secures to individuals the right to determine the extent to which their personal affairs could be communicated to others. Article 31 therefore guarantees the right to privacy in the following terms:

Every person has the right to privacy, which includes the right not to have—

- (a) their person, home or property searched;
- (b) their possessions seized;
- (c) information relating to their family or private affairs unnecessarily required or revealed; or
- (d) the privacy of their communication infringed.

The right to privacy is recognised in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and in many other international and regional treaties. This right is directly connected to other rights and freedoms such as human dignity, freedom of association and freedom

61 See ILO 'Forced Labour' available at http://www.ilo.org/global/Themes/Forced_Labour/lang--en/index.htm (accessed on 26 October 2010).

62 As above.

63 As above.

of speech.⁶⁴ Article 31 of the Constitution stipulates three types of privacy rights, namely, (i) personal/bodily (ii) territorial and (iii) informational. Personal or bodily privacy concerns the protection of the person against invasive procedures such as drug testing and cavity searches.⁶⁵ Territorial privacy, on the other hand, concerns the setting of limits on intrusion into an individual's domestic and other environments such as the workplace or public space.⁶⁶ Informational privacy involves the establishment of rules governing the collection and handling of personal data such as credit information and medical records.

2.7 FREEDOM OF CONSCIENCE, RELIGION, BELIEF AND OPINION

Article 32 guarantees the protection of a number of interrelated rights—right to freedom of conscience, religion, thought, belief and opinion. Generally, these rights entitle a person to hold a belief, opinion or conviction, be it of cultural, religious, political or any other nature. Specifically, the rationale of entrenching freedom of conscience in the Constitution is to allow an individual to hold a thought or belief that is independent of a state's or other entity's control *per se*.⁶⁷ Freedom of conscience in its broader sense envisages the right to profess and practice one's religion. This freedom, as contemplated under Article 32(2), envisages the right to manifest one's religion or belief in public or in private, through worship, practice, teaching or observance. This includes observance of a day of worship. Though not expressly provided in the Constitution, the freedom to maintain or change one's religion or belief is anticipated in the enjoyment of this right.⁶⁸

The Constitution proscribes discrimination based on belief or religious grounds. Thus, no one may be denied access to any

64 See the Australian Privacy Charter, published by the Australian Privacy Charter Group, Law School, University of New South Wales, Sydney 1994.

65 See Global Internet Liberty Campaign 'Privacy and Human Rights: An international survey of privacy laws and practice' available at <http://gilc.org/privacy/survey/intro.html> (accessed on 26 October 2010).

66 As above.

67 Nmehielle (n 24 above) 104.

68 See J Harris, *et al*, *Law of the European Convention on Human Rights* (1998) 361.

institution, employment or facility, or the enjoyment of any right on the basis of their belief or religion. Likewise, a person shall not be compelled to act, or engage in any act, that is contrary to his or her belief or religion.⁶⁹ While articulating on this aspect, the African Commission observed that freedom of religion has to be exercised in a way that does not violate the equal protection of the law. It therefore condemned the blanket imposition of Islamic sharia trials in Sudan and insisted on the right of everyone to be tried by a secular court if they wished.⁷⁰

The Commission, however, has been careful to point out that freedom to manifest one's religion or belief does not in itself include a general right of the individual to act in accordance with his or her belief.⁷¹ Rather, while the right to hold religious beliefs should be absolute, the right to act on those beliefs should not. In *Gareth Anver Prince v. South Africa*⁷², a South African citizen alleged that the Law Society of South Africa had refused to register him for practice, given his disclosure of two previous convictions for the possession of cannabis and his stated intention to continue to use it because its use was required by his Rastafarian religion. He alleged violation of, among other provisions, Article 8 of the African Charter, which guarantees freedom of religion and conscience.

The African Commission held that the restrictions on the use and possession of cannabis were reasonable and a legitimate limitation of the right to freedom of religion.⁷³ Indeed, participating in one's religion should not be at the expense of the overall good of the society. Religious minorities may freely choose to exercise their religion, yet that should not grant them unfettered powers to disregard the norms that keep the whole nation together.⁷⁴

69 See Art 32(4) of the Constitution.

70 Communications 48/90, 50/91 and 89/93, *Amnesty International, Comite Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V) para 73.

71 Communication 255/2002, *Gareth Anver Prince v. South Africa*.

72 As above.

73 As above.

74 As above.

2.8 FREEDOM OF EXPRESSION

Article 33 of the Constitution guarantees everyone the right to freedom of expression. The scope of this right includes the freedom to seek, receive or impart information or ideas; freedom of artistic creativity; academic freedom and freedom of scientific research. The enjoyment of this right, however, precludes propaganda for war, incitement to violence, hate speech or advocacy of hatred. In other words, an individual can only enjoy the right to freedom of expression subject to the rights and reputation of others.⁷⁵

The right to freedom of expression is the cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion as it enables the society, when exercising its options, to be sufficiently informed.⁷⁶ The African Commission observed in *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v. Nigeria*⁷⁷, that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of public affairs in his country.⁷⁸

The case of *The Law Offices of Ghazi Suleiman v. Sudan*⁷⁹ provided the Commission with an opportunity to clarify its jurisprudence on the right to freedom of expression as well as to underscore the important link between freedom of expression and the promotion and protection of democracy in Africa.⁸⁰ The case alleged that Mr. Ghazi Suleiman, a Khartoum-based lawyer and human rights advocate was barred from travelling to deliver a public human rights lecture in Sinnar, Blue Nile State, in the Sudan. The author complained of a violation of Article 9 of the African Charter, which

75 Art 33(3).

76 See S Davidson *The Inter-American human rights system* (1992) 310.

77 Communications 105/93, 130/94 & 152/96, *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V).

78 As above, para 54.

79 Communication 228/99, *The Law Offices of Ghazi Suleiman v. Sudan*, Sixteenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex VII).

80 See the analysis of this nexus in M Banderin 'Recent developments in the African regional human rights system' (2005) 5/1 *Human Rights Law Review* 130.

guarantees the right to freedom of expression. In upholding the complaint, the African Commission observed:

In adopting the *Resolution on the Right to Freedom of Association*, the African Commission noted that governments should be especially careful that 'in regulating the use of this right, that the competent authorities should not enact provisions which would limit the exercise of this freedom ... [and that] ... the regulation of the exercise of the right to freedom of association should be consistent with state's obligations under the African Charter on Human and Peoples' Rights.'⁸¹ Mr. Ghazi Suleiman's speech is a unique and important part of political debate in his country.⁸²

The Commission went on to affirm the views of the Inter-American Court of Human Rights to the effect that:

Freedom of expression is a cornerstone upon which the very existence of a society rests. It is indispensable for the formation of public opinion. It is also a condition *sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.⁸³

The Commission could therefore be taken to mean that when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual to disseminate information that is being violated but also the corresponding right of others to receive information and ideas. Hence, speech that contributes to political debate must be respected and protected.⁸⁴ In light of the important role of the right to freedom of expression in the fledging democracies in Africa today, these observations and findings of the African Commission must be received as landmark pronouncements.

81 See 'Resolution on the Freedom of Association', adopted at the 11th Ordinary Session in Tunis from 2 to 9 March 1992. [Footnote retained].

82 *The Law Offices of Ghazi Suleiman v. Sudan* (n 79 above) para 46.

83 As above, para 49, quoting from *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (arts 13 & 29 American Convention on Human Rights) Advisory Opinion OC-5/85, Series A. N.5, November 1985 at para 70.

84 *The Law Offices of Ghazi Suleiman v. Sudan* (n 79 above) para 50.

2.9 FREEDOM OF THE MEDIA

In line with the right to freedom of expression, the Constitution expressly guarantees freedom of the media.⁸⁵ It is needless to emphasise that a free press contributes tremendously to establishing and maintaining an open and democratic society.⁸⁶ In Kenya, for example, the media have played a critical role in sensitising the society on the importance of embracing democratic values and principles. Since the re-introduction of multi-party politics in the country in the early 1990s, the media have attempted to provide a discussion forum to enable the public to participate in the democratisation process. Lately, the Kenyan media have also played a watchdog role in the fight against corruption and related socio-economic vices.

The important role of the media in democratising the country notwithstanding, press freedom in Kenya has been more of a myth than a reality. The media have been a subject of political interference, in addition to their myriad economic, infrastructural and human resource constraints. These constraints have in the very least affected the freedom of the country's mass media. For freedom of the media to be realised, it is not just enough to have a flowery package of rights entrenched in the Constitution. Additionally, this freedom should be coupled with efforts to overcome every constraint that may stifle the media in their operations.

2.10 FREEDOM OF ASSOCIATION

Article 36 entitles everyone the right to free association.⁸⁷ This right envisages a number of components. For example, it contemplates the freedom of individuals to come together for the protection of their interests by forming a collective entity which represents them. These interests may be of a political, economic, religious, social, cultural, professional or labour union nature. This is a 'two-fold' right in that, while it precludes the compulsion of a person to join an association of any kind, it also denies one the absolute

85 See art 34 of the Constitution.

86 I Currie and J de Waal (eds) *The New Constitutional and Administrative Law* (2002) 374.

87 Art 10(1) states: 'Every individual shall have the right to free association provided that he abides by the law.'

right to become a member of an association. In other words, an association may decline to admit or continue the membership of an individual without necessarily infringing on his or her right to freedom of association. The right to freedom of association has also been interpreted to include the right to dissociation.⁸⁸

In Kenya and Africa at large, the right to freedom of association has been violated with impunity on a number of occasions. These violations were manifested in the banning of political parties, persons being arrested because of their political belief and the prohibition of any assembly for a political purpose in a private or a public place. Because of such incidents, the Constitution appears to provide some safeguards for the enjoyment of this right by organisations or groups by ensuring that their registration is not withheld or withdrawn unreasonably.⁸⁹ In the same way, before an organisation's registration is cancelled, it ought to be granted fair hearing.⁹⁰ Generally, any legislation purporting to limit the right to freedom of association should be objective enough to enable one to know, beforehand, the circumstances under which this right could be limited and the nature and extent of the limitation. As emphasised by the African Commission:

... authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards; ... in regulating the use of the right to association, the competent authorities should not enact provisions which will limit the exercise of the freedom and such a regulation should be consistent with state obligations under the Charter.⁹¹

88 Communication 101/93, *Civil liberties Organisation in Respect of the Nigerian Bar Association v. Nigeria*, Eighth Annual Activity Report of the African Commission on human and Peoples' Rights (Annex VI).

89 Art 36(3)(a).

90 Art 36(3)(b).

91 'Resolution on the Right to Freedom of Association, adopted by the African Commission on Human and Peoples' Rights', at its 11 Ordinary Session, See *Documents of the African Commission* 225.

2.11 ASSEMBLY, DEMONSTRATION, PICKETING AND PETITION

The right to freedom of assembly, demonstration, picketing and petition complements the right to freedom of association. The Constitution allows individuals to engage in meetings, picketing, protest marches and demonstrations, as long as the assemblers are peaceful and unarmed.⁹² Actions or laws aimed at quelling armed or violent assemblies will therefore not constitute an infringement of this right.⁹³ For instance, in *Commission Internationale de Juristes v. Togo*⁹⁴, the African Commission found that the shooting at peaceful demonstrators by the Togolese military was a violation of this right.

2.12 POLITICAL RIGHTS

The Constitution guarantees citizens a wide array of political rights. From the wordings of Article 38, these can be listed as the right to:

- (a) form, or participate in forming, a political party;
- (b) participate in the activities of, or recruit members for, a political party;
- (c) campaign for a political party or cause;
- (d) be registered as a voter;
- (e) vote by secret ballot in any election or referendum;
- (f) be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

Generally, Article 38 presents different facets in which the right to political participation in Kenya may be enjoyed. In the main, the right is intended to ensure citizens' participation in government either directly or through freely chosen representatives. Essentially, this means, subject to relevant electoral laws, citizens are entitled to participate in periodic elections either as candidates or voters.⁹⁵

92 Art. 37.

93 See the Constitution of the Republic of South Africa art 17. See also Nmehielle (n 24 above) 113.

94 Communication 91/93, *Commission Internationale de Juristes v. Togo*.

95 See art 38(2) & (3) of the Constitution. See also M Mbondenye 'The right to participate in the government of one's country: An analysis of Article 13 of the African Charter on Human and Peoples' Rights in the light of Kenya's 2007 political crisis' (2009) 9 *African Human Rights Law Journal* 185-186.

The purpose of Article 38 is therefore to allow an individual, without apparent legal disability, to participate in periodic elections, exercise his or her voting rights, and participate in the conduct of public affairs directly or through freely chosen representatives. By extension, the provision requires state authority to be based on the sovereignty of the people.

It is rather unfortunate that many African states, not in the very least Kenya, have not taken heed of the citizens' right to political participation despite its fundamental importance to nation building. Consequently, their citizens have been victims of governments of exclusion such as dictatorships, military rule, or single-party autocracies. Ethnicity, corruption and vote rigging have also had a hand in derailing the democratic process on the continent.

It is encouraging to note that the importance of this right is resonated in the Constitutive Act of the African Union (hereafter 'CAAU' or 'the Act'). The Act condemns and rejects unconstitutional change of government.⁹⁶ In fact, it categorically states that a government that seizes power through unconstitutional means shall not be allowed to participate in the activities of the Union.⁹⁷ The Union has a variety of options on how to deal with an unconstitutional government, including imposition of sanctions.⁹⁸ The entrenchment of this right in Kenya's Constitution is therefore a pointer to the country's commitment to upholding international standards of democracy, at least on paper. Hopefully, this commitment shall be translated into positive action to avert incidents of political turmoil such as the one that was experienced in the aftermath of the 2007 elections.

2.13 FREEDOM OF MOVEMENT AND RESIDENCE

Freedom of movement and residence in the context of the Constitution envisages the right to enter, remain and reside in and leave the country. Whereas the right to 'leave' the country extends

96 See Constitutive Act of the African Union, art 4(p).

97 As above, art 30.

98 Art 23 provides as follows: '2. ...any member state that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other member states, and other measures of a political and economic nature to be determined by the Assembly.'

to ‘every person’, which may include aliens, the right to ‘enter, reside or remain anywhere’ in Kenya is a preserve for citizens.⁹⁹ The rationale for couching the provision in this language may have been to avert instances of expulsion or exiling of citizens for political or other reasons.

2.14 RIGHT TO PROPERTY

Every person has the right, either individually or in association with others, to acquire and own property of any description in any part of the country.¹⁰⁰ Although arbitrary deprivation of property is expressly prohibited,¹⁰¹ the right to property does not extend to any unlawfully acquired property.¹⁰² Moreover, the state can deprive a person of property under certain exceptional circumstances, for example, if the acquisition is for a public purpose or is in public interest.¹⁰³ Such acquisition must be accompanied by prompt payment in full of just compensation to the affected person.¹⁰⁴

To ensure that the power to encroach upon private property is not abused, there should be enabling statutory provisions that would require the state to adhere to the international law principles of payment of just and adequate compensation. For instance, the amount of the compensation and the time and manner of the payment must reflect an equitable balance between the public interest and the interests of those affected, with due regard to all relevant circumstances. Such circumstances should include, for example, the current use of the property; the history of the acquisition and use of the property; the market value of the property; the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and the purpose of the encroachment. It would be more expedient if the time and manner of the payment is agreed to by those affected or in the alternative, decided or approved by a competent court of law.

99 See art 39(1) & (2).

100 Art 40(1).

101 Art 40(2)(a).

102 Art 40(6).

103 Art 40(3)(b).

104 Art 40(3)(b)(i).

It is noteworthy that the right to property as stipulated in the Constitution is not limited to the protection of land rights. Rather, the term ‘property’ should be taken to mean both movable and immovable property. This explains why Article 40(5) extends this right to intellectual property. The provision obliges the state to ‘support, promote and protect the intellectual property rights’ of its people.

2.15 LABOUR RELATIONS RIGHTS

The Constitution intends to promote fair labour relations and practices by guaranteeing both employees and employers the enjoyment of certain rights. Accordingly, every worker has the right to fair remuneration, reasonable working conditions, to form, join or participate in the activities or programmes of a trade union and to strike.¹⁰⁵ On the other hand, every employer has the right to form, join and participate in the activities and programmes of an employers’ organisation. The Constitution also safeguards the rights and interests of employers’ organisations and trade unions. Some of the rights to be enjoyed by these organisations include the right to determine their own administration, programmes and activities; to organise, form and join federations; and to engage in collective bargaining.¹⁰⁶

Arguably, the right to fair labour practices also precludes sexual harassment at the work place. This may be construed from the wording of Article 41(2)(c), which guarantees the right to ‘reasonable working conditions.’ A working environment cannot be termed as reasonable if employees are subjected to sexual harassment and other related vices. The government is therefore expected to come up with suitable legislation and policies to prohibit such vices that may render work conditions un-equitable and unsatisfactory.

2.16 RIGHT TO CLEAN AND HEALTHY ENVIRONMENT

In terms of Article 42 of the Constitution, every person has the right to a clean and healthy environment. This includes the right to have the environment protected for the benefit of present and future generations. The right to a clean and healthy environment

105 Art 41(2)(a)–(d).

106 Art 41(4) & (5).

gears at maintaining an environment fit for human habitation that poses no, or minimum, threat to human life. Environmental conservation is very important in this respect. It is important to note that this right has both individual and collective dimensions.¹⁰⁷ The individual dimension is the right of any victim or potential victim of an environmentally damaging activity to obtain reparation for harm suffered, while the collective dimension imposes a duty on individuals and states to cooperate to resolve environmental problems.¹⁰⁸

The right to a clean and healthy environment has in the recent past become very important and relevant to Africa as a whole. The importance culminated from the toxic waste dumping of 1988 in some African countries by international corporations.¹⁰⁹ After discovering the dumping, the former Organisation of African Unity (OAU) took quick action to forestall future occurrences. The same year, the OAU Council of Ministers passed a resolution condemning the import of toxic wastes to Africa, and emphasised that toxic dumping is a crime against Africa.¹¹⁰ This resolution was followed by the adoption of the convention banning the importation of toxic waste into Africa.¹¹¹

When implementing Article 42 of the Constitution, it is imperative to note that the primary responsibility lies with the government to adopt measures that will ensure effective environmental conservation and management. Article 69(1) of the Constitution augments this position when it imposes on the state the obligation to—

107 U Umozurike *The African Charter on Human and Peoples' Rights* (1997) 75.

108 As above.

109 Nmehielle (n 24 above) 157.

110 'OAU Council of Ministers Resolution on Dumping of Nuclear and Industrial Waste in Africa', adopted at Addis Ababa, 23 May 1998. CM/Res. 1153 (XLVIII); (1989) 28 *International Legal Materials* 567.

111 Bamako Convention on the Ban of Importation into Africa and the Control of Transboundary Movement and Management of Hazardous Waste Within Africa; concluded at Bamako, 29 January 1991. (1991) 30 *International Legal Materials* 775.

- (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
- (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
- (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
- (d) encourage public participation in the management, protection and conservation of the environment;
- (e) protect genetic resources and biological diversity;
- (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
- (g) eliminate processes and activities that are likely to endanger the environment; and
- (h) utilise the environment and natural resources for the benefit of the people of Kenya.

On the other hand, individuals have a duty to cooperate with the government and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.¹¹² In fact, the Constitution provides for mechanisms to redress any violations of the right to a clean and healthy environment. According to Article 70(1):

If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

When addressing such claims, the court may make any order it considers appropriate to prevent or discontinue any act or omission that is harmful to the environment. It may also compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment. The court may also provide compensation for any victim of a violation of the right to a clean and healthy environment.¹¹³

¹¹² Art 69(2) of the Constitution.

¹¹³ Art 70(2)(a)–(c) of the Constitution.

At the pan-continental level, the findings and recommendations of the African Commission in *Social and Economic Rights Action Centre (SERAC) & another v. Nigeria*¹¹⁴ (otherwise known as the ‘Ogoni case’ or ‘SERAC case’) bring out very pertinent issues on the right to a clean and healthy environment. The communication was brought on behalf of the Ogoni people, alleging that the military government of Nigeria had, among other provisions, violated Article 21 of the African Charter (relating to the right to a clean environment) by virtue of being directly involved in oil production through the state oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC).¹¹⁵

It was the complainants’ contention that, by disposing toxic wastes into the environment and local waterways, the oil consortium exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities. The consortium also allegedly neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages. The resulting contamination of water, soil and air had serious short and long-term health impacts, including skin infections, respiratory ailments, and increased risk of cancers, and neurological and reproductive problems.¹¹⁶ The African Commission noted that:

... despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter. ... Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them

114 Communication 155/96, *Social and Economic Rights Action Centre (SERAC) & another v. Nigeria*, Fifteenth Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex V).

115 As above, para 1.

116 As above, para 2.

from damaging acts that may be perpetrated by private parties. This duty calls for positive action on the part of governments in fulfilling their obligations under human rights instruments.¹¹⁷

The African Commission rightly suggested that, although the Nigerian government had the right to produce oil to fulfil the economic and social rights of Nigerians as a whole, it equally had the duty to protect the interests of the Ogonis who were being affected by its activities. Hence, when a state allows private persons or groups to act freely and with impunity, it would be in violation of its obligations to protect the human rights of its citizens. There is, therefore, an obligation on governmental authorities to take steps to make sure that private persons do not interfere with the enjoyment of the rights to a clean and healthy environment in spite of the economic gains brought about by their activities.

2.17 ECONOMIC, SOCIAL AND CULTURAL RIGHTS

As a marked departure from what obtained in the Independence Constitution, the current one guarantees the protection of economic and social rights.¹¹⁸ This is an indication that the new constitutional dispensation puts economic, social and cultural rights at par with other rights such as civil and political rights. Indeed, it is detrimental to dissociate economic and social rights from other categories of rights in their conception as well as enforcement. It must be understood that human rights are interrelated and indivisible.

It is highly expected that the most contentious issue on the Constitution's economic and social rights provisions will be their enforceability. For many decades, socio-economic rights have been regarded as secondary rights. Mbazira rightly noted that, 'civil and political rights are thought to be 'absolute' and 'immediate', whereas economic, social and cultural rights are held to be programatic; to

117 As above, paras 57-58.

118 See arts 43 and 44 of the Constitution. Those listed under these provisions are the right to: the highest attainable standard of health, which includes the right to health care services, including reproductive health care; accessible and adequate housing, and to reasonable standards of sanitation; be free from hunger, and to have adequate food of acceptable quality; clean and safe water in adequate quantities; social security; education; emergency medical treatment; social security; language; and culture.

be realised gradually and therefore not to be 'real' rights.¹¹⁹ The argument that socio-economic rights are not justiciable is based on the conception that these rights require vast resources for their implementation. This view, however, is blind to the fact that not all socio-economic rights need to be implemented immediately.¹²⁰

Indeed, the International Covenant on Economic, Social and Cultural Rights (ICESCR) attests to this fact by requiring states to 'take steps to the maximum of [their] available resources, with a view to progressively achieving the full realisation of the rights ...'¹²¹ Although the UN Committee on Economic, Social and Cultural Rights has said that some of the obligations are of immediate effect, this does not necessarily mean that states are compelled to do the impracticable.¹²² The argument on impracticability of enforcement of socio-economic rights is also blind to the fact that the enforcement of some civil and political rights may be equally impracticable. The right to life, for example, imposes an obligation on the state to provide security to its citizens. But this does not mean that murders are not committed. It is impracticable to provide every citizen with a police officer at his or her guard.¹²³ One would therefore agree with Ankumah that economic, social and cultural rights are justiciable, but there is the need for their progressive realisation, taking into consideration the circumstances faced by individual states.¹²⁴

2.18 FAMILY RELATED RIGHTS

Article 45 identifies the family as the natural and fundamental unit of society and the necessary basis of social order. The rights guaranteed to the family include the rights to marry¹²⁵ and equality

119 See C Mbazira 'A path to realising economic, social and cultural rights in Africa? A critique of the New Partnership for Africa's Development' (2004) 4 *African Human Rights Law Journal* 36. See also A Eide 'Economic, social and cultural rights as human rights' in E Eide, C Krause & A Rosas (eds) *Economic social and cultural rights: A text book* (2001) 10; K Arambulo *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights* (1999) 58.

120 As above.

121 ICESCR, art 2(1).

122 Mbazira (n 119 above) 38. See also General Comment No. 3 (Fifth session, 1990) [UN doc E/1991/23] 'The nature of the states' obligations' (art 2, para 1 of the Covenant).

123 As above.

124 See Ankumah (n 89 above) 144.

125 Art 45(2).

in marriage.¹²⁶ The right to marry is a preserve of persons of opposite sex, meaning that the Constitution does not sanction homosexual marriages. Again, a marriage will only be valid upon the ‘free consent of the parties’. This implies that forced marriages are not by law recognised.

Other than just casually stating that the family shall enjoy the recognition and protection of the state, the Constitution does not specify ways in which such protection could be afforded. It will not be enough for the state to create a legislative framework to secure family rights. It must, in addition, strive to create social conditions that would enable families to flourish, without necessarily compromising on their privacy. It has been proposed that the state could, for example, undertake special programmes geared towards training of families in order to help create a stable and positive environment in which children will be imparted with virtues and values.¹²⁷

2.19 CONSUMER RIGHTS

Consumers have certain constitutional rights in relation to the purchase of goods and services. Article 46 of the Constitution enlists them as the right to—

- (a) goods and services of reasonable quality;
- (b) the information necessary for them to gain full benefit from goods and services;
- (c) the protection of their health, safety, and economic interests; and
- (d) compensation for loss or injury arising from defects in goods or services.

In Kenya, the rights of the consumer are enshrined in a number of Acts of Parliament, for example, the Sale of Goods Act. Some of these laws protect the consumer from misleading advertising, unfair contract terms and undue discrimination. It is rather unfortunate, however, that many consumers do not know of the existence of these rights and therefore feel that they have little power in the marketplace. This situation is exacerbated by consumers’ lack of

126 Art 45(3).

127 Nmehielle (n 24 above) 132.

knowledge of their responsibilities. It is needless to mention that consumer rights are best safeguarded when consumers know and fulfill their responsibilities. Consumers must know that their protection is largely dependent on how well they meet their responsibilities.¹²⁸ Consumers should take responsibility by, among other ways, shopping around for the best deals, knowing how to compare prices and quality and learning how and where to complain when they are not content with their goods and services.¹²⁹

2.20 JUSTICE RELATED RIGHTS

The Constitution guarantees a number of justice related rights, including, the right to fair administrative action;¹³⁰ access to justice;¹³¹ rights of arrested persons;¹³² right to fair hearing;¹³³ and rights of persons detained, held in custody or imprisoned.¹³⁴ The common threat cutting across this cluster of rights is the emphasis that the justice system ought to be accessible, expeditious, efficient and procedurally fair. Exorbitant or unreasonable fees should therefore not impede access to justice.

It is noteworthy that the Constitution has adopted international standards in its approach to the right to trial. For instance, it guarantees fair hearing, the right of appeal, presumption of innocence, defence by counsel of one's choice, trial by an impartial court or tribunal, individual criminal responsibility, and the prohibition of *ex-post facto* laws.

The Constitution also entrenches the right 'to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result.'¹³⁵ It cannot be gainsaid,

128 See Communications Commission of Kenya 'Consumer rights and responsibilities' available at http://www.cck.go.ke/consumers/consumer_protection/downloads/consumer_rights_and_responsibilitiesfull.pdf (accessed on 9 November 2010).

129 As above.

130 Art 47.

131 Art 48.

132 Art 49.

133 Art 50.

134 Art 51.

135 Art 50(h).

the right to legal aid and assistance is an integral component of fair trial as it ensures that indigent persons are not denied fair hearing due to their insufficient, or lack of means to hire competent Counsel. However, the provision of legal aid and assistance is a capital-intensive undertaking, which many poor states, including Kenya, have found very difficult to accomplish effectively from their own resources.¹³⁶ A serious thought needs to be given to ways and means this right could be availed to indigent persons without compromising national resources that could otherwise have been utilised for development purposes.

2.21 RIGHTS OF SPECIAL GROUPS

The Bill of Rights has provisions specifically tailored to protect the rights of people falling within at least five groups, namely, children,¹³⁷ persons with disabilities,¹³⁸ youth,¹³⁹ minorities and marginalised groups,¹⁴⁰ and older members of the society.¹⁴¹ These could be said to be special groups of people who require preferential treatment owing to their vulnerability. Children, for example, are usually physically and emotionally vulnerable and need special support in order to fully enjoy their rights. They need family care and protection from abuse, neglect, forced labour, forced marriages, detention, among other concerns.

Due to this, the Constitution extends certain special rights to them, such as the right to: a name and nationality; free and compulsory basic education; basic nutrition, shelter and health care; be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour; parental care and protection, which includes equal responsibility of the mother and father to provide for the

136 See a similar argument in N Udombana 'The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa' (2006) 6 *African Human Rights Law Journal* 312.

137 Art 53.

138 Art 54.

139 Art 55.

140 Art 56.

141 Art 57.

child, whether they are married to each other or not; and not to be detained, except as a measure of last resort.¹⁴²

With regard to persons with disabilities, Article 54 entitles them to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning; access educational institutions and facilities to the extent compatible with their interests; reasonable access to all places, public transport and information; use Sign language, Braille or other appropriate means of communication; and access materials and devices to overcome constraints arising from their disabilities.¹⁴³ Moreover, the Constitution places an obligation on the State to ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.¹⁴⁴ Indeed, the protection afforded to persons with disabilities must go beyond providing them with suitable facilities, food and specialised medical care, to providing them with opportunities to engage in productive activities, commensurate with their abilities and consistent with their vocations or desires.¹⁴⁵

Additionally, states should ensure that disabled and old persons are able to access public places such as buildings and other social infrastructure. This is essential because, most public offices have not been designed to allow, for example, people on wheelchairs to access them. Public lavatories and streets in most Kenyan towns and cities do not have rumps which may ease the movement of such persons. As a result, many rights— civil and political as well as socio-economic— of such persons are violated. For instance, their right to freedom of movement is significantly limited. The same could be said of their right to freedom of association in as far as they are impaired by such factors to associate with other members of the society. All in all, the government should look for ways of facilitating the enjoyment of all the rights contained in the Constitution, to the fullest possible extent, by all the people, including the listed special groups.

142 Art 53(1)(a)-(f).

143 Art 54(1)(a)-(e).

144 Art 54(2).

145 Nmehielle (n 24 above) 137.

3 CONCLUSION

This Chapter has extensively underscored the specific rights entrenched in the Kenyan Bill of Rights. In the main, it has shown that the new Constitution has initiated a marked departure from what obtained in the Independence Constitution in so far as the promotion and protection of human rights is concerned.

CHAPTER FOUR

GENDER EQUALITY

RUTH AURA ODHIAMBO* & MAURICE ODUOR**

1 INTRODUCTION

Gender equality means a social order in which men and women share the same opportunities and the same constraints in the economic, social and political realms of life. There is little doubt that women have historically been accorded less than favourable treatment in these spheres compared with men. This difference has stemmed from mere sexual or biological distinction between male and female; a distinction that has been used as the basis for ascription of roles and entitlements to these sexes.

In a patriarchal society the sex-based assignment of roles has projected the spectre of inferiority even unworthiness, over women while casting the characteristic of superiority on to men. While this role-assignment sprung from the inherently patriarchal nature of the Kenyan society, it found good nurturing ground in institutions, such as, and especially the law. If, as it has been argued, law reflects predominant social values, then in a patriarchal society, where man is supreme, law will often re-imprint inherent gender imbalances and reinforce women's exclusion from the mainstream society.

The realisation that law had been transformed into a tool of discrimination against women led to various initiatives to change and conform it to aspirations of equality for all citizens regardless of sex. These changes, while undoubtedly instigated from within, were also significantly informed by drifts in the international field

* MWL, UZ; MPS, SARIPS; LLB, UoN; Dip. Law, KSL; Advocate of the High Court of Kenya, and Lecturer, Institute of Women, Gender & Development Studies, Egerton University.

** LLM, PITT; LLB, MU; Dip. Law, KSL; Advocate of the High Court of Kenya and Lecturer, Moi University School of Law.

especially with respect to human rights.¹ Reform of the law sought to achieve both formal and substantive equality. The former case involved textual changes in the law to secure the recognition and enforcement of fundamental guarantees of women, such as the constitutional amendment that barred discrimination on the basis of sex.² The latter involved the implementation of affirmative action plans designed to increase women's capacity to engage effectively with the social, economic and political processes in the society.³ These changes formed the foundation for a fully-fledged restructuring of the law and ultimately the adoption of a new constitutional framework. While many interest groups were represented to varying degrees in the constitutional review process, women's participation was very strategic in that they succeeded in tying in their concerns with the new dispensation.⁴

In this chapter, we discuss how the new Constitution incorporates gender equality within its framework. We examine the approaches that the Constitution has taken in a bid to promote the hitherto elusive equality between men and women in the law. We assess whether and the extent to which the new framework has sought to

1 Since the first international women's conference in Mexico in 1975 legal systems all over the world have focused on the inequalities of the sexes and how to remove them. This can be discerned from the many conferences held subsequently and the resultant instruments. Examples include conferences such as the Nairobi Forward Looking Strategies Conference of 1985, the Beijing conference that culminated in the Beijing Declaration and Platform of Action of 1995, and lately Africa's own blueprint conference on the Launch of the African's Women's Decade in Nairobi in 2010. The common theme for these conferences has been the quest for gender equality. In addition many governments, including that of Kenya have signed and ratified or merely endorsed by signature various United Nations conventions and declarations that promote gender equality and mainstream gender perspectives in all spheres of life.

2 See Act No 9 of 1997, s 9 amending s 82(3) of the Constitution (now repealed).

3 For example s 33 of the repealed Constitution had provided for the mechanism by which political parties nominated their members to be appointed by the President as Nominated Members of Parliament. In 1997 the section was amended to require parties to reserve some of those seats to women. See s 33(3) of the Constitution (now repealed) providing that 'The persons to be appointed shall be nominated by the parliamentary parties according to the proportion of every parliamentary party in the National Assembly, *taking into account the principle of gender equality*.' (emphasis added)

4 See, for example, CREAW *Constitution-making power dynamics, intrigues and struggles: Kenyan women reflect* (2008).

dismantle longstanding legal barriers on women. We determine in our analysis that, as a general premise, the quest for gender equality is synonymous with the struggle for the emancipation of the entire Kenyan society. In the pre-colonial world, women were basically beholden to patriarchal customary norms which treated them less equally with men. In the colonial period, women's marginalisation became more profound because of their subjection to at least two legal norms both of which were debilitating. While customary norms discriminated against women, the colonial legal system, itself an inherently exclusionary system reinforced the supposed inferiority of women. Suffice it to say that the colonial legal system was also premised on gendered notions of the roles of men and women in society.

Contrary to expectations independence and thereafter saw increased emasculation of Kenyans by rulers who found dismantling the colonial framework of governance to be inimical to their own individual interests.⁵ Thus, the post-colonial governments failed in their avowed transformative role. Some few normative changes were made but these did not go far enough in addressing issues of gender equality. For example, the addition of sex as one of the proscribed grounds of discrimination was merely a notional gain because other equally debilitating sections of the Constitution were left intact, defeating the entire purpose of the change. Suffice it to say that official bureaucracy was blind to the exclusion that women generally faced in the society.⁶ Nevertheless, many of these changes were a response to the clamour for a more inclusive democratic government.⁷

As Kenya inched towards democracy, more legal and constitutional space was opened up for its citizens thus creating

5 See, for example, P McAuslan 'Only the name of the country changes: The diaspora of "European" land law in Commonwealth Africa' in C Toulmin & J Quan (eds.) *Evolving land rights, policy and tenure in Africa* (2000) 75-95.

6 See Act No. 9 of 1997 s 9 amending s 82(3) of the Constitution (now repealed) (n 2 above).

7 For example the removal of s 2A of the repealed Constitution that had made Kenya a *de-jure* single party state and the passage of s 1A providing that 'The Republic of Kenya shall be a multiparty democratic state.' See respectively s 2A of the Constitution (now repealed) and s 1A of the Constitution (now repealed).

room for inclusion of women too. In the quest for further reforms, gender equality became an integral aspect to a new and acceptable constitutional order.⁸ In this light we argue that the new Constitution is a culmination of an evolving, though gradual, process of reform that has sought to recast the legal and social status of women over the years. We argue that this Constitution attempts to address traditional exclusion that Kenyan women have faced and the attendant 'second-class' treatment that that exclusion wrought over them. In its avowed goal of securing social justice for all the Constitution seeks to provide a framework that will lead to the inclusion of women in the mainstream Kenyan society. In this chapter we look at how this Constitution has attempted to achieve this goal and whether indeed it is possible to actualise its gender equality ideals.

2 BACKGROUND

A historical analysis of Kenya throughout the pre-colonial, colonial and post-independence periods suggests rather distinct patterns with respect to the legal status of women. A general trend, however, has been either that women have been subtly discounted from the mainstream society or that the law has outrightly discriminated against them in many spheres of life. Women have been less able to enjoy certain rights than men. They have had poor access to education.⁹ They have controlled significantly lesser resources than their male counterparts.¹⁰ They have been more vulnerable to social,

8 CREAW (n 4 above).

9 A number of obstacles militate against girls' access to education including cultural practices such as child marriages, female genital surgeries prevent them from benefiting from educational opportunities; unwanted pregnancies cause girls to drop out while some parents may simply not see the need to put girls through schools. See for example Ministry of Education Science and Technology, *Kenya Education Sector Support Programme 2005–2010* 247 available at <http://planipolis.iiep.unesco.org/upload/Kenya/Kenya%20KESSP%20FINAL%202005.pdf> (accessed on 15th November 2010). See also C Kitetu 'Gender in education: An overview of developing trends in Africa' available at <http://www.ling.lancs.ac.uk/groups/crile/docs/crile54kitetu.pdf> (accessed on 15th November 2010).

10 See, for example, United Nations Development Programme *Kenya human development report 2001* (2002) 30; See also Republic of Kenya *Poverty reduction strategy paper for the period 2001–2004* (2001) 36.

economic and political shocks.¹¹ Penal laws have not responded to their specific needs.¹² And they have played lesser roles in terms of exercise of public power.¹³

Nevertheless it appears that as Kenya slowly ambled toward the path of democracy and opening up of the political space certain allowances were made in favour of women. Thus since say the 1990s the legal status of women started changing albeit at a less than desirable pace. Following the re-introduction of multi-partism, women were able to secure a few concessions from the political establishment and the society at large.¹⁴ Comparatively more concessions were gained in the period following the change of regime in the year 2002.¹⁵ Due to the more open political space civil societies as well as some members of parliament were able to literally engineer certain changes in the law that responded to inequalities engendered by exclusion and discrimination of women.¹⁶ While the politicians were slowly beginning to see the need to make better laws with respect to women, our courts were rather slow in their response, or at best ambivalent. Occasionally courts recognised the inherent inequalities

11 For example, studies have indicated that women and girls suffered disproportionately during the violence that rocked the country following the botched-up presidential elections of December 2007. See CREAM *Women paid the price: Sexual and gender based violence in post election conflict in Kenya* (2008) 45 <http://www.preventgbv africa.org/content/women-paid-price-sexual-and-gender-based-violence-post-election-conflict-kenya> (accessed 14th November 2010). See also K Makokha and O Opondo *In the shadow of death: my trauma, my experience; voices of Kenyan women from the post election violence* (2009).

12 For a long time the law on sexual offences had been skewed against women. For example, while the Penal Code had proscribed rape, the prosecution of the offence had been bogged down by many deficiencies in the law as well as in the procedure. In addition the law did not respond adequately to cases of physical violence against women. See, for example, W Onyango-Ouma *et al The making of the Kenya Sexual Offences Act 2006: Behind the scenes* (2009).

13 See, for example, R A Odhiambo 'Women's access to and participation in politics and decision making in Kenyan local authorities: A case study of Nakuru Municipal Council' Unpublished Masters in Policy Studies thesis, University of Zimbabwe, 2003.

14 The inclusion of sex as a banned ground for discrimination occurred at this time. See Act 9 of 1997.

15 For example, the passage of far-reaching reforms in the law on sexual violence was achieved during this period of greatly opened up democratic space. See Onyango-Ouma (n 12 above).

16 Onyango-Ouma (n 12 above).

in the laws and practices in the country but largely made decisions that made little positive difference in the quest for gender equality.¹⁷

Historical anecdotes show that the practises of the communities that occupied the region later to be known as Kenya were as discriminative of women as they were in the colonial period and thereafter.¹⁸ Thus women were generally inferior to men, as were girls to boys. The roles that traditional communities ascribed to women were directly defined by the projection of women as inferior people.¹⁹ In some cultures, women were at the same level as children; in some they were objects, to be owned, used and sometimes even exchanged.²⁰ Certain cultural practices such as female circumcision, wife inheritance and chastisement were based on the skewed notions about male roles in the society.²¹

17 Routinely, decisions were made that re-emphasised the prejudices against women whether in criminal matters, in property matters, succession matters and so on. The Court of Appeal for example, decided in the case of *Otieno v Ougo* (2008) 1 KLR (G&F) 918 that under Luo customs, a widow had no right to inter her deceased husband as this was a prerogative of the members of her husband's clan. In *Kimani v Kimani* HCCC No. 1610 of 1999 (unreported) the judge in a simple matrimonial property division case launched a terribly misinformed and thoroughly misogynistic attack on Kenyan women in general. On the issue as to whether the woman in the case was entitled to a share of the property acquired in the course of the marriage the judge saw it fit to disparage the entire women's movement in its quest for equality of the sexes. The judge characterised the woman in the applicant's position thus:

Many a married woman goes out to work. She has a profession. She has a high career. She is in big business. She travels to Beijing in search of ideologies and a basis for rebellion against her own culture. Like anyone else, she owns her own property separately, jointly or in common with anyone. Her business interest, her property and whatever is hers is everywhere in Kenya and abroad, in the rural, urban and outlying districts. In Nairobi alone her property and businesses, swell through Lavington, Muthaiga, Kileleshwa, Kenyatta Avenue, swirls in Eastlands, with confluents from everywhere. Perhaps apart from procreation and occasional cooking, a number of important wifely duties, obligations and responsibilities are increasingly being placed on the shoulders of the servants, machines, kindergartens and other paid minders. Often the husband pays for all these and more...

18 See, for example, J Kenyatta *Facing Mount Kenya: The traditional life of the Gikuyu* (1938).

19 See Odhiambo (n 13 above).

20 Wife sharing is a cultural practice accepted among the Maasai where members of the same age-set are allowed to have sexual relations with each other's wives. See, for example, P Spencer *The Maasai of Matapato: A study of rituals of rebellion* (1988) 39; See also 'Sex, partner swapping, HIV and the Maasai' *Afrika News* available at <http://www.afrik-news.com/article15079.html> (accessed on 15th November 2010).

21 Odhiambo (n 13 above).

The colonial legal order exacerbated an already bad situation. When colonialists took effective political control they passed laws with a much wider geographical reach.²² These laws were steeped in the same cultural prejudices that women endured locally. They were mired in Victorian notions that objectified women, and cast upon them the characteristic of weak, brittle items that would never survive but for the wardship of men. For example, until the repeal of certain provisions of the Penal Code, rape was categorised under ‘offences against morality’²³ suggesting that violating a woman’s chastity was a crime against the society and not a violation of individual rights. This denial of personhood to women was at the core of patriarchy and formed the basis of women’s exclusion.²⁴ If women were prejudiced in the pre-colonial time the new legal order doubly reinforced their exclusion.

The decade following independence saw little change in the foundational attributes of the law and therefore women’s status remained the same. Women were still under the triple yoke of local culture, foreign law and the European cultural values. A popular adage is that when colonialists left, the people who replaced them were only different from them by their skin colour.²⁵ Otherwise they imbibed the same ideals as the European colonisers; they glorified the same power as the colonisers; they lived the same life as Europeans; they took over the property that was left behind by departing Europeans; they had the same elitist views as the colonialists. As a result of their training and education, a lot of the post-independence leaders, had acquired a taste for power and authority and were aware of the personal advantages that such power brought.²⁶ Thus rather than implement social reform strategies such as fair land redistribution, the ruling elite embarked on a journey of accumulation of property and monopolisation of power. Many of

22 Y P Ghai & J P McAuslan *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present* (1970) Chapter 1 generally.

23 See s 139 (now repealed) of the Penal Code.

24 See Onyango-Ouma (n 12 above).

25 McAuslan (n 5 above).

26 As above.

the constitutional safeguards against abuse of power were dismantled through numerous amendments.

As they consolidated power the post-independence governments became less responsive to the needs of the people and averse to dissenting political views. They resorted to both police and judicial powers to deal with perceived oppositionists. However, Kenyans continually agitated for an overhaul of the system of government, a quest that culminated in the new constitutional order in 2010. For women an open and democratic society that paid significant premium to the rule of law and respect for human rights was far better because it would likely respond to their specific needs and attempt to redress their exclusion from the mainstream society. We now look at the specific ways in which the pre-2007 legal facilitated and reinscribed the poor status of women.

3 GENDER AND LAW IN THE PRE-2007 CONSTITUTIONAL DISPENSATION

3.1 POLITICAL DECISION-MAKING

In spite of the historical prejudices that women faced in the society, the Constitution was expressed in gender blind terms—it treated every person as equal.²⁷ In view of their exclusion from the mainstream society women could not take advantage of any of the available opportunities to serve in political positions. Women were ever under-represented in positions of public power.²⁸ There were fewer of them in parliamentary, civic and other elective positions.²⁹ The patriarchal set-up of the Kenyan society meant that women were relegated to less public roles.³⁰ This exclusion also meant that fewer women were part of the elite which formed the pool of political leaders.³¹ Women were often unable to command the financial resources that would enable them compete effectively with their male counterparts.³² The

27 See s 70 of the Constitution (now repealed).

28 Odhiambo (n 13 above).

29 As above 2.

30 As above Chapter 4.

31 As above 51-52.

32 As above.

political culture in Kenya is defined by male experiences and hence does not respond to or accommodate the peculiarities of women.³³ The vicious, often violent confrontation in the political landscape, effectively locked out women from political contests.³⁴ The legal framework in its part did not facilitate effective engagement by women in politics.³⁵ The often male-dominated political parties gave few or no opportunities for women leadership.³⁶ Until 2008 there was no comprehensive legal framework governing political parties.³⁷ They were constituted as voluntary organisations under the Societies Act and as such could be organised in any way the members pleased.³⁸

3.2 PROPERTY RELATIONS

3.2.1 ACQUISITION AND OWNERSHIP

On the face of it the Constitution protected the right of everyone to acquire and own property of whatever description.³⁹ Acquisition and even protection of one's property requires that one has command of the necessary resources. The systematic exclusion of women from the mainstream society limits women's access to education and subsequent employment.⁴⁰ Even for those engaged in informal trade, lack of or poor access to capital means that they are unable to raise funds that would then give them the opportunity to acquire

33 Odhiambo has noted that 'the socialisation process has implanted in people's minds stereotype ideas about the roles of men and women in society culminating in not only men barring women from taking part in political affairs but also in women themselves not believing in their capacity to be leaders.' Odhiambo (n 13 above) 52.

34 Odhiambo (n 13 above) 62- 63.

35 For example, s 34 of the repealed Constitution provided that a person must have belonged to a political party to qualify for election into the National Assembly. See s 34(d) of the Constitution (now repealed).

36 CREAW *Running for political office: A handbook for women candidates* available at www.creawkenya.org/pdf/running_for_political_office.pdf (accessed on 10th November 2010).

37 The Political Parties Act 2007, provided for a framework for governing political parties but it only came into force on 1st July 2008.

38 CREAW (n 36 above).

39 S 75 of the Constitution (now repealed).

40 See Institute of Economic Affairs-Kenya *Profile of women's socio-economic status in Kenya* (2008) 30.

property.⁴¹ The constitutional right was the proverbial paper right insofar as Kenyan women were concerned.⁴²

3.2.2 INHERITANCE

In both testate and intestate succession, Kenyan law routinely reinforced gender discriminative cultural practices.⁴³ In the former case a court might be called upon to interpret the same in case of a dispute among the beneficiaries. However, to the extent that the Constitution allowed individuals to elect to be governed by personal law in matters such as inheritance, such individual might rely on their customs and exclude female children from the estate.⁴⁴ In some communities a married woman would only have a life's interest that ended as soon as she remarried.⁴⁵ Even though courts interfered with a testator's discretion in the division of the estate, they often followed applicable customary practices.⁴⁶

In intestate succession section 36 of the Law of Succession Act provides that where the deceased was survived by a spouse and a child or children, the surviving spouse inherits absolutely the personal and household effects of the deceased but only acquires a life interest in the residue of the estate. However, if the surviving spouse is a woman then if she remarries, the life interest ends. There is no such termination if the surviving spouse is a man who remarries hence

41 As above.

42 See P W Karanja 'Women's land ownership rights in Kenya' (1991) *Third World Legal Studies* 110.

43 The Law of Succession Act cap 160.

44 See, for example, Kenyatta (n 18 above) (describing inheritance patterns among the Gikuyu).

45 Kenyatta (n 18 above).

46 *In the Matter of the Estate of Mutio Ikonyo (deceased)* Machakos High Court Probate and Administration Number 203 of 1996 (unreported), the court held that a married daughter of the deceased was not entitled to a share of the estate. According to Mwera J the married daughter, being a Kamba, ought to have known that under Kamba customary law only unmarried daughters or those divorced (and dowry returned) could claim to inherit. Before the Court of Appeal intervened in the case of *Rono v Rono* a female judge had invoked customary law to deprive the deceased's daughters from inheriting their deceased father's estate on equal footing with their brothers. See *Rono v Rono* Eldoret High Court Probate and Administration Cause No. 40 of 1998 (unreported); see also the Court of Appeal decision of *Mary Wanjia Gichuru v Esther Wach Gachuhi* Civil Appeal No. 76 of 1998 (unreported) where the court affirmed the Kikuyu custom of patrilineal inheritance.

the section is directly discriminatory against women.⁴⁷ In terms of section 39 if no spouse or child(ren) survive the deceased, the property devolves first to the father of the deceased and to the mother only if the father is dead. Where the intestate was polygamous (invariably a man, in this respect) the Act states that the personal and household effects shall devolve to all the houses proportionately to the number of children in each house except that the surviving wives will also be included as 'an additional unit to the number of children.' The personal and household effects will then be distributed within each house in accordance with the rules of intestate succession in sections 35 to 38. The remaining estate will also be subject to the same rules of distribution.

3.3 CUSTOMARY LAW AND PRACTICES

Customary law and practices have both a constitutional and statutory basis.⁴⁸ While the old Constitution purported to guarantee the right to equal treatment and non-discrimination it limited that right with respect to 'personal law.' Section 82(1) provided that 'no law shall make any provision that is discriminatory either of itself or in its effect'; subsection 4 of the same section exempted laws that made provision 'with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of *personal law*.' Further the subsection excluded laws that provided 'for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.' The above two provisions were given statutory fiat by the Judicature Act which directed that the courts:

shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent

47 It amounts to 'affording different treatment to different persons attributable wholly or mainly to their respective descriptions by ... sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.' See s 82(3) of the repealed Constitution and s 27(4) of the new Constitution.

48 S 82(4) of the Constitution (now repealed) and s 3(2) of the Judicature Act.

with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.⁴⁹

Considering that customs have been the locale of women's discrimination in Kenya, their constitutional and statutory bases simply legitimise the gender biases inherent in them. This has more significant ramifications in a legal system infused with a culture of judicial restraint, because instead of becoming liberators, courts become instruments of subjugation. The case of *Otieno v Ougo & another*⁵⁰ shows how courts straddled the chasm between a debilitating customary law principle and a liberating human right ideal. The appellant was the widow of one S.M. Otieno, a sometime prominent Nairobi lawyer. A tussle ensued between her and her husband's relatives as to who had the right to bury the deceased and where such burial was to be conducted. The appellant claimed she had such a right to bury her deceased husband on the basis *inter alia* that she was his wife.

The respondents, in this case, the appellant's in-laws, argued that as members of the clan from which the deceased had hailed, they had such right based on the principles of customary law applicable to them. Under that custom the clan took responsibility of burying its deceased members. The court agreed and held that the appellant did not have such right because she never became the head of the family when her husband died. The court stated that 'the appellant as the deceased's wife has to be considered in the context of all wives married to Luo men irrespective of their lifestyles who become subject to the customary laws.' The effect of the holding was that a woman married to an African man was subjected to the customs of her husband and, specifically as the court suggested, was wholly subsumed into her husband's culture. In the present case custom dictated that a wife lost her autonomy and had no power to make decisions relating to the burial of her husband since customs ordained that the clan should take over. The court rejected any insinuation that such practice was discriminatory on the ground that section 82(4)(b) allowed the application of customs in situations where they

49 S 3(2) Judicature Act (n 48 above).

50 *Otieno v Ougo* (n 17 above).

would otherwise be discriminatory. In the case of *Gichuru v Gachuhi*⁵¹ the court affirmed and applied the Kikuyu custom of inheritance which it expressed to be patrilineal, that only sons inherited their father's land. The Court of Appeal relied on a previous decision in determining the applicability of the custom, that of *Wambugu v Kimani*⁵² where the court upheld the Kikuyu custom that a married woman could not inherit her father's property. In both the cases a principle of custom was applied to prevent a woman from inheriting her father's property. Such rule was discriminative because it never applied to married sons.

3.4 INEQUALITIES IN MARRIAGE

The claw-back clause in section 82(4) allowed the application of personal law in marriage among other matters. This coupled with the statutory framework on marriage made for the simultaneous operation of multifarious regimes of marriage laws in Kenya. There was civil marriage, Hindu marriage, Islamic marriage and customary marriage. Some of the marriage types provide a platform for the perpetuation of various discriminative practices against women. Theoretically the law sees the parties to a marriage in equal terms but in reality and depending on the regime in question the parties may not be in equal terms during the marriage.⁵³ Bride price is central to the formalisation of marriages in many Kenyan communities. However it has been shown that quite often bride price no longer represents an important formal step in a marriage but rather is a source of an imbalance in the relationship of the parties to the marriage. Evidence suggests that there is likelihood that payment of bride price imbues in men a false sense of ownership over the bodies of their wives.⁵⁴

In a study conducted in Nakuru town, it was clearly established that some men physically abused their wives because they believed

51 Civil Appeal No. 76 of 1998 (unreported).

52 [1988-1992] 2 KAR 292.

53 For example, a system that allows polygamy potentially exposes women to certain distinct imbalances that may result in discrimination.

54 CREAW *Bride-price: is it modern day slavery?* (2008).

that the fact of payment of bride price entitled them to do so.⁵⁵ The imbalance created in such a situation also means that women are often powerless in terms of sexual relations in the marriage meaning that they cannot make decisions consistent with protection of their reproductive health. Customary law marriages are potentially polygamous. So too are Islamic marriages. Polygamy quite often breeds inequalities.⁵⁶ First off, the fact that it is men who are free to marry more than one woman and not the other way round is in itself a function of the socially defined gender roles in the society. A man having multiple marital partners appears acceptable in the society but not the other way round. Thus polygamy subordinates women and creates a situation where women are treated as less than equal members of the society.⁵⁷ They appear not to have the right to engage in the same practices that men do yet they are equally human.⁵⁸ Coupled with the institution of bride price, polygamy merely accentuates the gendered power imbalances.⁵⁹ Because of patriarchy women in polygamous relationships are less likely to be engaged in formal employment or otherwise gainfully employed. The result is likely to be a dependency on the husband for sustenance. With limited shared source of income, such women are not adequately provided for hence exacerbating the inequalities that already exist in the family.

In certain cultures, women do not choose their partners in marriage in contradiction to their right of freedom of association. An example would be the practice of widow inheritance prevalent among, say, the Luo of Western Kenya.⁶⁰ It is cultural that if a

55 See, for example, R A Odhiambo 'Intimate terror: A case study of the law versus the lived realities of battered wives among the Luo community living in Nakuru, Kenya' Unpublished PGD dissertation, University of Zimbabwe 2000.

56 T Brooks 'The problem with polygamy' (2009) 37(2) *Philosophical Topics* 109-122 (noting that 'Polygamy... fails to treat wives as equals with their husbands, denying women the same rights, liberties, and opportunities available to men. Therefore, polygamy represents an unjustified asymmetry of power between men and women: polygamy should be banned'; see also S Nakitto 'Polygamy in the Domestic Relations Bill 2003: A barrier to the women's human rights in Uganda?' Unpublished LLM thesis University of Nottingham 2007.

57 Brooks (n 56 above).

58 As above.

59 As above.

60 CREAW *Wife inheritance: a death sentence behind the mask of culture* (2008) 6.

woman's husband dies a male relative takes upon the responsibility of the dead husband by marrying the widow.⁶¹ Often the widow has no choice over whom she gets into that relationship with the decision being made by other, often male, members of the family.⁶² Not only does the practice infringe on a widow's freedom to choose but also exposes her to various risks such as HIV infection.⁶³ Widows are usually powerless in many of such situations because a refusal to accept to be inherited would likely spell doom to their social security.⁶⁴ The repercussions might include being ostracised from the community with the attendant inability to access or use property left behind by her deceased husband.⁶⁵ To secure their interests and that of their children, widows would be forced to agree to such levirate institutions.⁶⁶

3.5 MATRIMONIAL PROPERTY

Kenyan law has been unclear on the rules for division of matrimonial property hence providing an opportunity for replication of gendered stereotypes. The lack of a statute spelling out applicable principles meant that courts had to fashion some form of guidelines.⁶⁷ Being in a common law jurisdiction Kenyan courts had to import English law for assistance.⁶⁸ The English Married Women's Property Act ('MWPA') of 1882 was imported as a statute of general application to fill in the lacuna.⁶⁹ The MWPA affirmed a married woman's

61 As above.

62 As above.

63 As above 3

64 As above.

65 As above.

66 As above.

67 Kenyan courts long ago decided that they would use the English Married Women's Property Act of 1882. In the case of *I v I* [1971] EA 278 Justice Trevelyan held that the said statute was applicable in Kenya as statute of general application as ordained by s 3 of the Judicature Act. Since then, Kenyan courts have resorted to the Married Women's Property Act particularly s 17 thereof as the statutory basis for determining the respective entitlements of parties in a failed marriage. See, for example, *Karanja v Karanja* [1975] KLR 307.

68 Kenyan courts have relied on a long line of English decisions to develop their own jurisprudence on the division of matrimonial property. See, for example, the *Karanja* case (n 67 above).

69 See the case of *I v I* (n 67 above).

capacity to own property in her own name separately from her husband.⁷⁰ It granted power to the court to consider the respective shares of the parties to the property following a divorce.⁷¹ Using the MWPA and applicable English cases Kenyan courts developed a set of principles to be applied in matrimonial property matters. Progress had been incremental but measured. Until recently, following a Court of Appeal decision it would have been possible to argue that the law had developed in response to the specific problems faced by women in matrimonial property matters. Through a careful pruning of English cases, and use of principles of contract and equity, Kenyan courts had laid down the rules that would be applicable generally in matrimonial property issues.⁷²

Generally where a party came into the marriage with their own separate property then unless there had been some conveyance of the same to the other party the property remained singly owned at the dissolution of the marriage.⁷³ However, property acquired during the subsistence of the marriage would have to be apportioned between the parties. The first consideration would be whether a claimant made a financial contribution towards acquisition. Such financial contribution might be direct or indirect. It would be direct when a party put in money directly into its acquisition in which case the court would simply have to determine the proportion of that contribution. It would be indirect if one of the parties spent money in other matters that the acquirer of the property would otherwise have had to cater for. The principle of indirect financial contribution was characterised in the case of *Karanja v Karanja*⁷⁴ as follows:

*[P]ayments by the wife need not be direct payments towards the purchase of property, but may be indirect such as the meeting of household and other expenses including expenditure on clothing for the wife and children and the education of the children which the husband would otherwise have had to pay...*⁷⁵

70 Married Women's Property Act 1882 s 1.

71 Married Women's Property Act s 17.

72 See the *Karanja* case (n 67 above) (discussing several English cases on matrimonial property).

73 Ordinary principles of contract would apply in such a case.

74 (n 67 above).

75 Emphasis added.

The *Karanja* case stood for the principle that in division of matrimonial property the court would look to the financial contribution made by the parties whether directly or indirectly to the acquisition of the property. Indirect contribution would include the wife's expenditure in maintaining the home, educating the children or paying for other expenses such as food and clothing for the family hence relieving the husband from shouldering that burden and perhaps applying his earnings to the acquisition of property.

Subsequent cases recognised that in the case of women, proving financial contribution whether direct or not might be problematic. In view of the fewer opportunities that women got in a patriarchal society, they were less likely to be suitably educated for a market-oriented economy. Fewer opportunities for gainful employment meant that women would not likely have a source of income necessary to prove financial contribution. What would be left then would be to look at other forms of contribution that might be made by a woman to the family; the sort of work that a wife might do at the home that indirectly contributes to the acquisition of the property. This point was explored and accepted by the Court of Appeal in a number of cases. For example in *Nderitu v Nderitu*⁷⁶ the issue was whether a court would be entitled to take into account the domestic and mothering chores of a wife in the home in determining her respective share in the matrimonial property. In holding for the appellant the court held that the indirect contribution by a spouse need not be monetary. Justice Kwach relied on earlier Court of Appeal decision in *Kivuitu v Kivuitu*⁷⁷ which, in his view, set out the law on indirect contribution. Thus 'running of the house' in the case of an urban housewife or 'tilling the family land and producing either cash or food crops' in the case of a rural wife were the types of indirect non-monetary contribution that a court would have to look at and 'assess the value to be put on the wife's non-monetary contribution.' Justice Kwach recognised that a wife's contribution especially in Kenya will more often take the form of 'a backup service on the domestic front rather than direct financial contribution.' In effect, therefore, a court would have been perfectly entitled to take

76 Civil Appeal No. 203 of 1977 (unreported).

77 [1991] KLR 248.

into account any form of contribution whether direct or indirect, monetary or non-monetary.

This position was favourable to women as it recognised the special circumstances that Kenyan women found themselves in when they get into a marriage. However the Court of Appeal has since ‘clarified’ the law on the issue of indirect non-monetary contribution. Following the decision of a five-judge bench in *Echaria v Echaria*⁷⁸ the law is that a court was not entitled to look at non-monetary contribution of a spouse because that rule as purportedly created in the case of *Kivuitu v Kivuitu*⁷⁹ was not applicable in Kenya. In fact the Court of Appeal held that the rule that a court can look at the non-monetary contribution of a wife such as child-bearing roles was not part of the ratio in the *Kivuitu* case but was a statement made *obiter*.

3.6 INTERNATIONAL HUMAN RIGHTS STANDARDS

Prior to the 27th August 2010⁸⁰ the sources of law on Kenya were, as set out in the Judicature Act: the Constitution; Acts of parliament; some specified UK statutes; where no written law exists, the substance of the common law, doctrines of equity and statutes of general application in force in England on 12th August 1897; and finally customary law.⁸¹ Kenyan courts had held for a long time that no legal principles outside this framework would be applied as a source of law. In particular it had been decided in the case of *Okunda v R*⁸² that international law and principles did not form part of Kenyan law unless they were domesticated. The principle that international law only applies upon domestication, i.e. the dualist principle of international law, is one that has faithfully been affirmed and re-affirmed by Kenyan courts over time.⁸³

78 Civil Appeal No. 75 of 2001; [2007] eKLR.

79 See the *Karanja* case (n 67 above).

80 This is the date when the new Constitution came into force. See Legal Notice No. 133 of 2010 on the promulgation of the new Constitution.

81 See s 3 Judicature Act.

82 (1970) EALR 18.

83 The *Echaria* court deliberately eschewed the inconvenience of having to decide whether or not to apply international law even after recognizing that the various instruments ratified by Kenya showed that they ‘are progressive notions and a useful pointer to the future.’

However Kenyan courts appeared to have been relaxing the restrictive approach to international legal principles particularly in the field of human rights. The court's *obiter dicta* in the *Echaria* case certainly recognised the need to rely on principles of international law especially those set out in treaties ratified but not yet domesticated, and specifically so in women's rights issues. The court was rather emphatic on this issue in the case of *Rono v Rono*,⁸⁴ a dispute over inheritance of the estate of an intestate polygamous man where a High Court had apportioned more property to the sons as opposed to the daughters. On appeal the Court of Appeal stated that while the Constitution outlawed discrimination on the basis of sex, this protection was taken away by the very Constitution, allowing the application of discriminatory personal and customary laws. The question was whether this was proper within the circumstances of the case and the country's constitutional law framework in general.

The court determined that it had to consider the applicability of international law in determining the issue of distribution. It noted that Kenya had ratified without reservation a number of international treaties that outlawed discrimination on the basis of sex. In particular the *Convention on the Elimination of all Forms of Discrimination against Women* and the *African Charter on Human and People's Rights* were instruments that were very categorical about the obligation of all state parties' to eliminate practices and laws that discriminated against women.⁸⁵ The court noted that having ratified these instruments Kenya had amended its Constitution to include sex as one of the grounds of discrimination that was not allowed. But the instruments had not yet been domesticated into the Kenyan legal system. The issue then became whether international law treaties ratified by Kenya but not domesticated could nevertheless be applicable as a source of law in view of the provisions of section 82(4) of the Constitution and section 3(1) of the Judicature Act. The court held that 'both international customary law and treaty law can

84 Civil Appeal 66 of 2002; [2005] eKLR.

85 *Convention on the Elimination of all Forms of Discrimination against Women* GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980), entered into force Sept. 3 1981 arts 2 and 3; *African Charter on Human and People's Rights* adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, art 18(3).

be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation.⁸⁶

Thus by 27th August 2010 the law as it stood was that courts in Kenya could resort to international treaties to which Kenya was a party and where no reservations had been entered. The decision was a significant milestone insofar as the enforcement of human rights was concerned. International principles could be used as a standard for local law by courts involved in the determination of disputes over rights. Laudable as it was the position was still tenuous because first there had to be a judicial determination on a policy or decision to weigh its legality. Secondly, courts could not necessarily be relied on to develop uniform standards on the applicability of international law having regard to the rigours of litigation. The process of developing jurisprudence on the application of international legal norms especially those that had not been reduced into treaties would be rather slow and perhaps uneven. There was always a need for a definitive constitutional statement on the issue to guide both private and public actors when dealing with human rights and particularly the rights of women.

3.7 SEXUAL AND GENDER-BASED VIOLENCE

Women and girls bear the brunt of violent conduct in the Kenyan society.⁸⁷ The causes are varied as a study in Nakuru established.⁸⁸ Cultural and social stereotypes contribute in no small way to physical and sexual violence against women and girls.⁸⁹ Wife chastisement is a cultural practice that receives endorsement from a significant

86 At least one High Court considered and followed the reasoning in the *Rono* case. *In Re the Estate of Lerianka ole Ntutu* Succession Cause No. 1263 of 2000; [2008] eKLR. the court considered the applicability of international law in the face of contradictory constitutional and statutory law provisions. Here the sons to a deceased intestate sought to exclude their sisters from a share in their father's estate on the ground that Maasai customary law governed the inheritance and based on its provisions, daughters were not entitled to inherit their father's property. The court disagreed. It had to consider the effect of the claw-back clause of s 82(4) on the ban on discrimination on the basis of sex imposed by s 82(3) of the then Constitution. Drawing inspiration from the *Rono* case, the court held that s 82(4) could not have been meant to allow discrimination on the basis of sex as defined in s 82 (3).

87 See, for example, *Report of the commission of inquiry into post-election violence* (2008) 237.

88 Odhiambo (n 55 above).

89 As above 19

portion of Kenyan men and some women.⁹⁰ Apparently it is the husband's role to 'straighten up' his wife whenever she steps out of the way.⁹¹ Abuse of alcohol and drugs has also been identified as a source of such violence. Economic imbalances in the family may lead to violent confrontations.⁹² For example, when a husband is the bread earner with a wife solely dependent on the husband's largesse, there may be a tendency for the husband to control use of what is given out for use in the family. Incidences have been reported where a man would chastise his wife for supposedly misusing the resources.⁹³ Sexual and gender-based violence revolves around patriarchal notions about the roles of men and women in society by which the man is in control and the woman is the subject beholden to the whims and wishes of the man.⁹⁴ Since patriarchy imbues a notion of superiority of man over woman, the violence directed towards women may easily be rationalised as normal. For example, wife chastisement may be explained simply as a manifestation of the man's natural leadership role.⁹⁵ Sexual violence such as rape may be rationalised as a means of disciplining a woman or girl for dressing provocatively.

The significance of gendered power relations is that they also determine official response to violence against women. Wife battery is relegated to the realm of the 'private' or 'domestic'; a matter to be resolved within the confines of the bedroom or if grave, within the extended family structure or at worst using non-formal interventions like the church, elders etc.⁹⁶ Official structures, themselves influenced by the all too familiar gendered stereotypes, become indifferent to women's reports about violence perpetrated on them.⁹⁷ The

90 As above.

91 As above 20-21.

92 As above 23.

93 As above 23.

94 As above 19.

95 As above.

96 As above.

97 As above 40.

law on its part either simply ignores women's and girls' plight or creates a purportedly neutral framework that does not appreciate the unique experiences that women face in our society. Studies in Kenya seem to vindicate this argument. For example, a study on the institution of bride price in marriages indicated that very often women experienced some form of violence related to its payment or non-payment.⁹⁸ Unfortunately the inappropriate responses by the official structures discouraged complaints by the victims.⁹⁹ Violence against women is routinely misrepresented as a non-concern for the police resulting in cases being processed through other non-formal mechanisms that then reproduce prejudices against women.¹⁰⁰

While the Sexual Offences Act (soa) sought to respond to the specific challenge of sexual violence there is as yet no targeted measure that seeks to deal with other forms of violence against women and girls.¹⁰¹ The SOA consolidated the law relating to sexual offences in Kenya. It redefined the offence of rape to remove the ambiguities that existed in the then applicable law, the Penal Code.¹⁰² It also clarified other offences that were up till its passage not clear or poorly defined hence less effectively enforced. In addition it created a whole new set of offences and basically revolutionised the entire regime of law on sexual offences.¹⁰³ It enhanced the sentence in the case of certain offences and provided a framework for effective implementation of the law on sexual offences.¹⁰⁴ Many of the new provisions were intended to be a response to the inadequacies in the

98 CREAW (n 54 above).

99 As above 40.

100 Odhiambo (n 55 above) 40.

101 See the Sexual Offences Act No. 3 of 2006 the preamble of which provides that it is an Act of Parliament meant to 'make provision about sexual offences, their definition, prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes.'

102 For example, s 3(1) defined rape in a much broader manner than the Penal Code provisions it repealed.

103 For example, sexual assault, s 5; attempted rape, s 4; compelled or induced indecent acts, s 6; gang rape, s 10; child trafficking s 13; child sex tourism s 14; child prostitution s 15; child pornography s 16 etc.

104 Rape attracts imprisonment of between 10 years and life s 3(3); Sexual assault 10 years' imprisonment that can be enhanced to life, s 5; Indecent assault 5 years or less, s 6; Defilement of a child 15 or 20 years or life depending on the circumstances, s 8; attempted defilement, 10 years, s 9; gang rape, 15 to life, s 10 etc.

law on sexual violence on women; recognising that women and girls bore the greater brunt of sexual violations in Kenya.

3.8 SOCIAL AND ECONOMIC RIGHTS OF WOMEN

Kenya's Constitution did not recognise socio-economic rights as a distinct category of rights capable of not only being defined but also enforced in the country. The focus was political and civil rights. However the link between civil and political rights on the one hand, and the social and economic status of citizens on the other is not fictional.¹⁰⁵ Indivisibility of human rights means that all rights are intertwined.¹⁰⁶ The right to life, for example, means little if the subject is unable, through official action or inaction, to access basic needs such as food, clothing and shelter.¹⁰⁷ Likewise that right is hollow if the official action or inaction compromises the health of citizens e.g. through non-provision of health care services institutions, implements, personnel and so on. Where citizens do not access educational opportunities they will not be able to apply themselves usefully in a society where technology quite often defines lifestyles. If social and economic rights mean nothing for the Kenyan society as a whole, then for women and girls, the situation is bleaker. Women and girls face disproportionate social and economic burdens that are broadly traceable to age-old stereotypes that prevent women from accessing opportunities for advancing themselves. Government statistics have consistently established that of the number of poor

105 See, for example, Z Celumusa 'The extent, if any, to which socio economic rights are enforced in South Africa: lessons from the judgments of the constitutional court', (2009) 1 *OIDA International Journal of Sustainable Development* 71-75 <http://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev.html> (accessed on 10th November 2010); see also S Fredman (2009) 'Engendering Socio-economic rights' (2009) 25 *South African Journal of Human Rights* <http://ssrn.com/abstract=1631765> (accessed on 11th November 2010); E C Christiansen 'Adjudicating non-justiciable rights: Socio-economic rights and the South African constitutional court' <http://ssrn.com/abstract=999700> (accessed on 11th November 2010).

106 O A Oladimeji 'Economic, social and cultural rights: rights or privileges?' <http://ssrn.com/abstract=1320204> (accessed on 10th November 2010) ('the distinction between civil and political rights and economic, social and cultural rights on the ground of economic resources is untenable as all human rights require substantial part of the state resources for implementation.').

107 Oladimeji (n 106 above).

people in Kenya, majority are women.¹⁰⁸ Women's poverty simply exacerbates the inequality they face generally in the community.

The pre-2010 constitutional framework did not recognise socio-economic rights at all. For women, with their historical exclusion from the mainstream society, this failure had significant consequences. While the Constitution seemingly gave leeway for the implementation of corrective measures such as affirmative action, the amelioration of the socio-economic status of women required more than a mere exception to the general bar of discrimination in the Constitution. There was need for a more detailed framework of law that specifically called on institutions to take positive measures to rectify the imbalances that have resulted in the historical exclusion of women from the mainstream society. Sectoral interventions that were effected in education, for example, required a firm constitutional backing rather than non-binding policy statements.¹⁰⁹

4 GENDER EQUALITY IN THE NEW CONSTITUTION

4.1 GENERAL FRAMEWORK

The search for a new constitutional framework in Kenya has been a long one.¹¹⁰ Starting minimally from immediately after independence the struggle reached a crescendo during the regime of Daniel arap Moi, Kenya's second president.¹¹¹ While Kenyans suffered generally from bad governance and a lack of respect for the rule of law, the plight of women was worse. Studies have indicated that in regimes that habitually abuse human rights women bear the greater burden

108 J Kiringai *et al* 'The feminisation of poverty in Kenya: Is fiscal policy the panacea or achilles' heel?' *A paper presented during the 5th PEP Research network general Meeting June 18-22, 2006, Addis Ababa, Ethiopia*, http://www.pep-net.org/fileadmin/medias/pdf/files_events/5th_ethiopia/Kiringai.pdf (accessed on 25th November 2010).

109 For example, the Ministry of Education has implemented an affirmative action policy whereby girls get admitted to university with lesser points than boys. See Ministry of Education Science and Technology (n 9 above) 249.

110 See generally W Mutunga *Constitution making from the middle: Civil society and transition politics in Kenya 1992-1997* (1999); see also Committee of Experts on Constitutional Review *Final report of the committee of experts on constitutional review* (2010).

111 Mutunga (n 110 above).

of effects of poor governance.¹¹² Thus in a non-democratic system, women are doubly disadvantaged in political decision-making. Where the government habitually and violently puts down political dissent, the frequency of sexual and physical assaults on women goes a notch higher. Where law disregards social and economic rights the system cannot shield the poor, majority being women, from the ravages of poverty.¹¹³

Politically repressive regimes stifle the democratic space, do not allow for alternative ideas and generally limit the enjoyment of civil and political rights. Women are less likely to have political representation in such a regime. Where women's voices are locked out of the political decision-making process they cannot influence the development of policies in a way that responds to their unique needs and caters for their specific interests. Thus legal and policy frameworks will likely be discriminative against women. The drive towards a new Constitution was thus as much a struggle for the emancipation of women as it was of the country as a whole.

The 2010 Constitution is arguably the most pro-citizen framework that Kenya has or will probably ever have. It encapsulates principles of social justice and inculcates a culture of respect for human rights.¹¹⁴ While it disperses executive and legislative power to many institutions at the national and local levels to prevent abuses and enhance a democratic culture, it also places citizens at the centre of governmental decision-making.¹¹⁵ The Constitution requires that service to the public be the focus of bureaucratic decision-making processes.¹¹⁶ It frowns upon misuse of public power for private gain and seeks to open up governance to public scrutiny if not participation.¹¹⁷ But fundamentally the 2010 Constitution includes

112 See, for example, UNDP *Women and Political Participation: 21st Century Challenges* (2000).

113 The repealed Constitution made no provision for socio-economic rights.

114 See, for example, Constitution of Kenya, Preamble.

115 As above chapter 11.

116 As above art 232.

117 As above chapter 6.

a bill of rights with a rather expanded list of fundamental rights and freedoms.¹¹⁸

The Bill of Rights transcends the classical notions of human rights that were limited to civil and political rights only and embraces the concept of social, economic and cultural rights.¹¹⁹ Such an expanded list of entitlements clearly responds to the specific needs of women. For women and girls, there is even more to celebrate. The Constitution charts out rather targeted measures that deal with the traditional exclusion Kenyan women have hitherto endured. It requires affirmative action measures to be taken at various levels to ensure that women are included in decision-making processes.¹²⁰ It sets aside a number of slots in political institutions which should mandatorily be filled by women.¹²¹ It variously exhorts public institutions and agencies to avoid taking measures that discriminate against women and girls.¹²² In addition it sets up various institutions that should oversee the implementation of the new gender responsive framework. In the next part we discuss the specific provisions of the Constitution and assess how they might change the lot of Kenyan women so far as gender equality is concerned.

4.2 FUNDAMENTAL VALUES OF THE STATE

The 2010 Constitution is steeped in the values of social justice and respect for rights. Thus the preamble recognises that Kenyans aspire ‘for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.’ Some of the standards recognised as forming the national values and principles include ‘human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.’¹²³ Of course the preamble and national principles generally do not create justiciable rights but they point out the fundamental values that underlie the Kenyan

118 As above chapter 4.

119 As above art 43.

120 See discussion below.

121 Constitution of Kenya chapter 7.

122 As above art 27.

123 As above art 10.

constitutional dispensation.¹²⁴ Specifically, however, all state organs, state officers and public officers and every other person are required to have regard to the national values and principles of government whenever they apply or interpret the Constitution, or enact, apply or interpret any law or when they make or implement public policy decisions.¹²⁵ Thus those principles may also inform the interpretation of laws by the court in the event of a lacuna. In some jurisdictions such principles are expressed as directive principles of state policy and are explicitly unenforceable in courts. In India it has been argued that such values and principles are the goals that the state institutions should strive to achieve while observing fundamental rights and freedom.¹²⁶ In Kenya the national principles and values of governance are not specifically excluded from enforcement by the courts. Either way inclusion of such values in the Constitution allows for a wholesome construction of constitutional rights and entitlements not to mention their standard-setting function.¹²⁷

4.3 THE BILL OF RIGHTS

4.3.1 GENERALLY

The Bill of Rights is more nuanced and expansive than what has hitherto been the norm. It provides for a very wide array of rights and entitlements, a good number of which were alien to the previous constitutional order.¹²⁸ While there are general provisions that apply evenly to all, the Constitution makes specific references

124 It may be argued that to the extent that the preamble and the national values and principles correspond with many of the rights in the Constitution then they may at the very least be used to interpret certain provisions of the law. In any event the Kenyan Constitution does not explicitly state that the national values and principles may not be the subject of litigation. Comparatively the Indian Constitution provides that its directive principles of state policy shall not be enforceable in court. See Constitution of India art 37.

125 Constitution of Kenya art 10(1).

126 See M P Singh and S Devya 'The Constitution of India: symbol of unity in diversity' (2005) 53 *Jahrbuch des Öffentlichen Rechts der Gegenwart* [Yearbook of Public Law, Germany] 649–686.

127 In India it has been held that the directive principles of state policy though not directly enforceable in court define and inform the content of fundamental rights and hence cannot be ignored when interpreting or applying the Constitution. See Singh & Devya (n 126 above) 663.

128 For example, social and economic rights under art 43.

to women in many of its provisions.¹²⁹ This is very significant as it does away with the hitherto applied gender blind language in many legal provisions. At any rate the bill of rights is very clear on its prohibition of discriminative acts and decisions.¹³⁰ Importantly, the bill of rights, indeed the entire Constitution, encapsulates within it the concept of social justice¹³¹ essentially imposing obligations that require the political bureaucracy and private individuals where appropriate to think about the effect of their actions on the society as a whole.¹³² Thus when government agencies implement a policy decision they must as a matter of constitutional fiat have regard to the consequences of that decision on all, including the vulnerable marginalised portions of the society.¹³³ Fundamental too is the recognition that human rights inure to individuals by virtue of their being human and that the role of the state is simply to provide mechanisms for their protection.¹³⁴ Thus where the government fails to avail the tools necessary for the realisation of human rights, it fails in its general obligation under the law.

4.3.2 NON-DISCRIMINATION

Anti-discrimination principles are perhaps the most effective bulwark against oppressive public and private action. They provide the standard against which the legality of certain actions and decisions are measured. Thus it is that the Constitution provides fundamentally that ‘every person is equal before the law and has the right to equal protection and equal benefit of the law.’¹³⁵ This equality includes ‘the full and equal enjoyment of all rights and fundamental freedoms.’¹³⁶ For the avoidance of doubt it provides that: ‘Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and

129 For example, the phraseology in art 27(3) of the Constitution leaves no doubt as to its intended beneficiaries.

130 Constitution of Kenya art 27.

131 As above art 19(2).

132 See, for example, art 10(2) provision on national values and principles of governance.

133 Constitution of Kenya art 10(2)(b).

134 As above art 19(3).

135 As above art 27(1).

136 As above art 27(2).

social spheres.¹³⁷ This is clearly intended to reverse the historical exclusion that women have endured in the society.

But merely providing for equality is not sufficient for, as it has been said, there is nothing more unequal than the equal treatment of unequal people.¹³⁸ More practical measures need to be effected if this equality is to be meaningful. For this reason the Constitution in section 27(6) imposes an obligation on the state to ‘take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.’ In terms of political representation Article 27(8) provides a numerical benchmark in that ‘the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.’

The state is thus under an obligation to ensure that historically marginalised groups like women will firstly, be free to participate in mainstream society including political leadership, and secondly, that certain positions will be reserved for them so that they do not have to suffer the rigours of unequal political competition. This is simply to allow them to ‘catch up’ with those who have been in the game for a while and have had a head start. To ‘ensure greater certainty’ as far as the obligations of the State are concerned Part 3 of Chapter 4 provides for the ‘specific application of rights’ of certain of the rights in the Bill of Rights to certain groups of persons. Section 56 is expressed to apply to ‘minorities and marginalised groups.’ While it offers no definition for ‘minorities’ the Constitution defines a ‘marginalised group’ to mean ‘a group of people who because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4).’¹³⁹ Since women have traditionally been discriminated

137 As above art 27(3).

138 A quote attributed to Thomas Jefferson, 3rd President of the United States (1743 – 1826). See *Quotation Details*, at <http://www.quotationspage.com/quote/34758.html> (accessed on 30th October 2010).

139 See Constitution of Kenya art 260.

by 'laws or practices' the affirmative action programmes defined by the section should equally apply to them.¹⁴⁰

To free women and make them participate in the public life the Constitution bars discrimination even in the private sphere.¹⁴¹ The family, for example, has been identified as the location where the seeds of inequality are sown.¹⁴² The roles assigned to boys and girls simply reinforce societal perceptions about men and women. In private companies, employers are likely to craft discriminatory contractual terms. Equality in the private and public spheres makes for a more robust and just society. Thus while the State is barred from discriminating 'directly or indirectly against any person on any ground, including ...sex, pregnancy, marital status, health status,... disability,... dress', private persons are also under the same obligation. The ban on discrimination extends to acts, laws, decisions and policies that are either themselves discriminatory or otherwise produce discriminative consequences when applied. Thus the ambit of activities transcends legal provisions and will capture the day-to-day public and private decisions.¹⁴³

These obligations apply likewise in labour relations. In addition to guaranteeing the rights of employees set out in Article 41, employers must comply with the general non-discrimination clauses of the Constitution. This section must also be read together with the Employment Act which has more elaborate provisions to guide employment relations. This Act requires the relevant government officials and institutions to promote fair labour practices in all sectors of employment. Further it bars discrimination of any employees.

140 Art 56 provides that:

The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—

- (a) participate and are represented in governance and other spheres of life;
- (b) are provided special opportunities in educational and economic fields;
- (c) are provided special opportunities for access to employment;
- (d) ...
- (e) have reasonable access to water, health services and infrastructure.

141 Constitution of Kenya art 27(5).

142 Odhiambo (n 13 above).

143 See Constitution of Kenya art 20(1) providing that 'The Bill of Rights applies to all law and binds all State organs and all persons.'

Hence the Article 3(3)(a) provision that ‘No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status.’ Exempted from this are affirmative action plans that are ‘consistent with the promotion of equality or the elimination of discrimination in the workplace.’ The Act also proscribes acts of sexual harassment against women recognising that this is a problem that has continuously dogged women at the workplace.¹⁴⁴

Provisions on citizenship under the repealed Constitution directly discriminated against women in matters of citizenship. Section 91 of the repealed law stated that ‘A woman who has been married to a citizen of Kenya shall be entitled, upon making application in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of Kenya.’ However there was no corresponding entitlement for a non-Kenyan man married to a Kenyan woman. The effects of this discrimination were profound. Firstly, the wife could not confer citizenship status to her husband.¹⁴⁵ Secondly, the children of the marriage might not assume their mother’s citizenship especially if they were born out of Kenya. If they were born in Kenya they might choose to assume the citizenship of their father’s country. This might introduce more complications in cases of separation or divorce between the couple as the father might choose to impose his nationality on the children hence making it difficult for the wife to access them. If the couple live out of the country and assuming the children have non-Kenyan passports as they are more likely to, it would mean that every time the family visited the country the children would be treated as aliens, much like the husband and would thus be subjected to certain legal restrictions.

For the children to live for longer periods in the country they would require formal authorisation from the immigration officials such as residence permits in addition to being placed to certain

144 See s 6(1) of the Employment Act relating to sexual harassment.

145 See the Botswana case of *AG of Botswana v Unity Dow*, Civil Appeal No. 3 of 1991 (n 70 above)

additional legal disabilities that non-Kenyans face. The residence permits might in turn require to be renewed periodically. In the meantime their mother would have to undergo anxious moments every time the authorities had to determine her children's applications for entry and residence. Further, should the authorities decline their application for one reason or another necessitating their deportation or removal, the mother might be required to accompany them to their father's country.

The inconvenience placed on a mother in such a position is not only debilitating but also unfair. It produces a discriminative effect especially in view of the fact that the same treatment is not meted on a Kenyan man married to a foreign woman. It is discrimination based on sex *simpliciter*. It is denying women privileges and immunities accorded to men for no reason than that they are women. It is discrimination that has a cultural background that unfortunately finds expression in the law. The cultural notion is patriarchal. In many of Kenyan cultural practices a woman literally leaves her parents' home and moves into her husband's home. From then on she assumes her husband's identity and has none of her own. Having no identity she cannot pass any to her children.¹⁴⁶ Lineage being patrilineal her children assume her husband's identity. Conversely to a woman, a Kenyan man married to a foreign woman had the power to confer the right to apply for citizenship to his wife. He would not have to suffer the same hardship as a woman. His children would assume his citizenship automatically if born in Kenya. This lineage practice is what found expression in section 91 of the repealed Constitution.

The new dispensation ensures that this differential treatment of men and women based on their sex does not continue. Thus it makes elaborate provisions on citizenship seeking to redress discrimination of women. Marriage does not affect citizenship, whether subsisting or dissolved. Importantly though, Article 14 allows both a mother and a father to confer citizenship status on a child whether that child is born in Kenya or not. Further, Article 15 is neutral insofar as it allows any person (with no distinction as

146 See, for example, the case of *Otieno v Ougo* (n 17 above).

to sex) who is married to a citizen (again with no distinction as to sex) for a period of seven years or more to apply to be registered as a citizen.¹⁴⁷ Thus the disability imposed on women previously by the repealed Constitution no longer applies. Significantly, clause (5) provides for a retrospective reckoning of the time and other conditions for grant of citizenship.¹⁴⁸ Thus while the relevant time is the effective date i.e. 27th August 2010, citizenship may be granted even when the relevant conditions were fully or partially satisfied before the said date.

4.4 CIVIL AND POLITICAL RIGHTS

In terms Article 28, every person has inherent dignity and the right to have that dignity respected and protected. Dignity has been defined in the dictionaries as 'the quality or state of being worthy of esteem or respect.'¹⁴⁹ Dignity has to do with a person's self-worth, how they feel about themselves. Dignity is inherent, it is in-born. Like many other human rights, self-worth inures in all human beings by virtue of their being human. It is neither created nor granted by the state or other humans. To treat someone with dignity means to respect that person as a human being regardless of their situation. Patriarchal cultures have tended to objectify women. They have reduced women into near-nothingness, people not deserving the privileges and advantages that exist in the society. In some traditions women occupy the status of children if not worse.¹⁵⁰

In a study conducted in Nakuru, it emerged that men thought that they had a God-ordained responsibility to discipline their wives if they 'strayed'.¹⁵¹ Certain cultures decree that women cannot partake of certain foods. Others do not allow women to express their thoughts in public and so on. Such de-personalisation of women has at times found expression in the law. The Law of Succession Act in limiting a widow's right to inherit her husband's estate when she remarries sees women as something less of human beings. This

147 See art 15.

148 Art 15(5).

149 *The American Heritage Dictionary of the English Language* (4th ed. 2000) 507.

150 Spencer (n 20 above).

151 Odhiambo (n 55 above).

objectification of women is at the core of women's lower status in the society. The starting point for rectifying the inequalities women endure is to begin seeing them as human beings, persons with their own individual existence and with a right to be respected as such.

The Constitution legitimises this entitlement hence providing a ground for legal redress in case of a violation. The right to dignity ties in with the right to freedom and security of the person as well as the right to privacy. Freedom and security of the person includes *inter alia* 'the right not to be subjected to any form of violence from either public or private sources.' Article 31 protects the right to privacy. The Article is broadly crafted hence privacy may include many other situations not contemplated in the provision.

The violence that women sometimes face is traceable to cultural notions about the personhood of women. When women are not accorded personal dignity, they will be subjected to violence and humiliating or degrading treatment. It is for this reason that the same Article 29 includes the right not to be treated in 'cruel, inhuman or degrading manner.' Respecting every person's dignity means that their privacy will also be protected. If someone is accorded respect based on their humanity then even their bodily integrity will be respected. Hence violence of whatever form should not be visited upon them. The Constitution has made it clear that not being subjected to violence is now a right and not a mere statutory injunction. Violations will thus create a right to seek redress.

Sometimes women are vilified as a group rather than singly. Certain publicly expressed opinions may be degrading to women-folk as a whole. Politicians in Kenya have time and again been caught on camera making either direct or metaphorical references to women's supposed inferiority.¹⁵² While the freedom to express opinions is guaranteed under Article 33 of the Constitution the same is limited when it relates to advocacy of hatred that constitutes

152 One Mr Kiraitu Murungi denounced European donor conditions on corruption by boldly proclaiming on TV that the US decision to freeze assets of public officials was 'like raping a woman who is already too willing.' See E Wax 'Kenya is buffeted by graft scandals: Public confidence low after official resigns' *Washington Post* February 13, 2005 21, available at <http://www.washingtonpost.com/wp-dyn/articles/A19790-2005Feb12.html> (accessed on 15th November 2010).

inter alia ‘vilification of others’ or is based on any of the grounds of discrimination specified in the Constitution, of course including sex.¹⁵³

4.5 PROPERTY RELATIONS INCLUDING MATRIMONIAL PROPERTY

Even though the previous Constitution purportedly provided for the right to property, that right was never affirmatively proclaimed. In section 75, the then Constitution merely circumscribed conditions under which an individual’s property might have been acquired for public use.¹⁵⁴ The new Constitution affirmatively declares that ‘every person has the right, either individually or in association with others, to acquire and own property’ of any description and anywhere in Kenya.¹⁵⁵ Subsequent provisions limit the Government’s exercise of its eminent domain powers and circumstances under which an individual’s use and ownership of property may be limited.¹⁵⁶ While this right is said to be available to everyone it is obvious that its mere expression on paper has never been sufficient. Under the old Constitution every person presumably had the right to own and acquire land. But this bare provision never protected women especially widows and divorced women, albeit women in marital situations often found themselves at the receiving end of property rights violations by their spouses.¹⁵⁷ It was earlier shown that cultural patterns of inheritance generally prefer men over women.

Patterns of property ownership suggest that men are more in control than women. They are either the registered owners of family property or the determiners of usage. Rules relating to division of property after divorce clearly favour men, a fact affirmed by none other than a bench of 5 (male) judges of the hitherto highest court

153 Constitution of Kenya art 33(2).

154 That section set out conditions under which the Government might acquire private property for public use.

155 Constitution of Kenya art 40(1).

156 Constitution of Kenya art 40(2)–(6).

157 See R A Odhiambo ‘Strategies for civic education to promote land provisions in the constitution, women’s land rights’ paper presented at a workshop on women and land rights, Sirikwa Hotel, Eldoret, UNIFEM 2010.

of the land.¹⁵⁸ The fact that these biases persist to date means that there needs to be additional interventions that specifically respond to women's experiences.

With respect to family property, the Constitution provides for rights of equality of a husband and wife 'at the time of the marriage, during the marriage and at the dissolution of the marriage.'¹⁵⁹ This equality of rights, while encompassing many other matters should similarly apply to the parties' entitlement to matrimonial property. Thus it is anticipated that courts would adopt a different view with respect to the nature of women's contribution to matrimonial property. The Court of Appeal in *Echaria v Echaria*¹⁶⁰ decried the supposed legislative non-responsiveness to the inequalities posed by the matrimonial property regime.

The constitutional provision of equality of the parties even on dissolution of marriage should provide a starting point for the courts to fashion a more equitable matrimonial property rights regime. In addition such provision should also be useful in defining each party's claims while the marriage is subsisting. Thus, while a husband's name may appear in the register as the proprietor of family property, courts should be able to use this equality requirement to stop any dealings intended to dispose of the property or limit the wife's access or use of the property or any interest arising therein. With respect to inheritance of land or other property the general anti-discrimination clauses should be used to strike down any law or practices that discriminate against women. Portions of the Law of Succession Act that treat women differently must now be measured against the standards of the current law.

Beyond these general provisions, the Constitution has set out specific obligations that apply to land ownership and practices related to it. Thus in terms of Article 60 land shall be held, used and managed on the basis of principles including equitable access, security of rights and importantly for women, 'elimination of gender discrimination in law, customs and practices related to land and

158 The *Echaria* case (n 77 above).

159 Art 45(3).

160 The *Echaria* case (n 77 above).

property in land. These principles should be implemented through a *national land policy* developed and reviewed regularly by the national government and through *legislation*.¹⁶¹ The national land policy is to be developed by a National Land Commission established under Article 67 while the legislation is Parliament's mandate.

Article 68 requires Parliament to 'revise, consolidate and rationalise existing land laws', 'revise sectoral land laws in accordance with the principles set out in Article 60(1)', and enact legislation to *inter alia*, 'regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage.' Parliament thus has a clear mandate to legislate to govern matrimonial property during and after marriage. Since the mandate entails 'recognition and protection' of matrimonial property Parliament will have to devise principles that take into account the interests of the parties in the marriage and protect them. An opportunity has been availed for the State to frame laws that will ensure the abolition of discriminative practices on land. In addition that legislation or any other should 'protect the dependants of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land.' This should enable parliament protect those widows who are at risk of being disinherited by their husband's relatives for various reasons such as that they are not culturally entitled to inherit the land in question.

The existing National Land Policy framework neatly fits into the broad framework of the Constitution especially as regards women's rights to land. For example, it has taken cognizance of gender equity principles in land issues as well as matrimonial property.¹⁶² To anchor women's rights in the new dispensation on land and other productive resources and taking into account the fact that women are disadvantaged in land matters, the policy recommends certain measures that should inform any legislative initiatives on land including: enactment of appropriate legislation to ensure effective protection of women's land rights and other related resources; repeal

161 Emphasis added.

162 See Sessional Paper No. 3 of 2009 on National Land Policy paras 220-223; 224- 225.

of existing laws, regulations, customs and practices that discriminate women in relation to land; establishing a clear legislative framework to protect rights of women in issues of inheritance to land and land-based resources; the requirement that legislation governing matrimonial property should make a provision for joint spousal registration of land rights, and for joint spousal consent to land disposals, applicable for all forms of land tenure; the requirement that legislation governing division of matrimonial property should also replace the Married Women's Property Act of 1882 with regard to women's property rights; the making of specific provisions to secure inheritance rights of unmarried daughters; legislation to ensure proportionate representation of women in institutions dealing with land at all levels; review of succession, matrimonial property and other related laws to ensure that they conform to the principle of equality between women and men; and appropriate legal measures to ensure that men and women are entitled to equal rights to land and land-based resources during marriage, upon dissolution of marriage and after the death of a spouse.¹⁶³

4.6 POLITICAL REPRESENTATION

4.6.1 GENERALLY

In addition to guaranteeing the political rights of everyone, the Constitution has made very categorical pronouncements on women's participation in elective and other forms of politics. In Article 21 the State is saddled with the 'duty to address the needs of vulnerable groups within society, including women...' This obligation arises out of the recognition that women have been 'disadvantaged by discrimination'¹⁶⁴ for a long time 'because of laws and practices'¹⁶⁵ that have been in operation or are still in operation in the society. To fulfil this obligation the state will be required to implement practical measures to facilitate women's participation in the public life, inclusive of politics.¹⁶⁶ Seats will have to be reserved for women

163 See Odhiambo (n 163 above).

164 Constitution of Kenya art 260.

165 As above.

166 Constitution of Kenya art 27(6)-(8).

and certain quota requirements will have to be met. Women and other vulnerable groups will have to be facilitated by the State to enjoy the political rights enunciated in the Constitution. For example the right to make political choices and to freely participate in elections based on universal suffrage will be more meaningful for women when the state implements additional practical measures that remove the barriers to women's participation in politics.

Many factors hinder women in political matters. In a study of women civic leaders in the Rift Valley it was established that women frequently have no financial bases sufficient to enable them mount vigorous campaigns when vying for political posts.¹⁶⁷ In addition, women are frequently subjected to violence so as to intimidate them into giving up the quest for political office.¹⁶⁸ Coupled with patriarchal notions about the suitability of women to lead (sometimes expressed by women themselves) it is clear that the hurdles for women are a lot more than mere lack of opportunity. The Constitution has made further elaborate provisions that will ensure that the State and public officials respond to the need to ensure fairness and equality in political decision making. These include provisions on representation in various institutions at the county and national levels.¹⁶⁹ These must be read together with the entitlements in the bill of rights and will be discussed below.

4.6.2 PRINCIPLES OF THE ELECTORAL SYSTEM

Women's experiences in politics have been defined by the generally patriarchal make-up of the Kenyan society as a whole.¹⁷⁰ Deep-seated cultural beliefs and practises suggest that women should neither aspire to nor hold public offices.¹⁷¹ The way in which the Kenyan society reacts to women's quest for political leadership betrays an age-old negative socio-cultural notion that women are only good

167 Odhiambo (n 13 above).

168 As above.

169 Constitution of Kenya chapter 11 generally.

170 CREAW (n 36 above) 7.

171 Odhiambo (n 13 above) 52 notes that women are themselves beholden to these cultural stereotypes about their own abilities.

performing nurturing roles within the home.¹⁷² Women who venture into politics have to navigate significant obstacles propped up not only by their opponents but also by the society. Women have to react to demeaning and insulting language from their male and sometimes female opponents.¹⁷³ Coupled with that is the rather uneven playing field that poses inordinate burdens on women. For example, large sums of money are needed to mount political campaigns.¹⁷⁴ Women are generally incapable of raising capital that would be sufficient to mount credible campaigns.¹⁷⁵ Campaigns for political office are routinely violent affairs, physically and verbally, even for men.¹⁷⁶ The violence that women experience emanates from two levels; first from a generally violent political culture and secondly, from a patriarchal society that does not believe in leadership by females. The political rules of engagement, formulated as they are by men, reflect and respond to men's experiences thereby locking out women.¹⁷⁷ Unless the law tackles the structural and institutional barriers that prevent women from effectively engaging in politics, no equality will be achieved.

The Constitution has fundamentally altered the system of government, and with it, the politics of the country. In terms of Article 81 the electoral system is required to comply with *inter alia* the principles that 'no more than two-thirds of the members of elective public bodies shall be of the same gender.'¹⁷⁸ This guide ties in with the myriad affirmative action obligations imposed on the state.¹⁷⁹ The electoral system should also be based on free and fair elections which are 'free from violence, intimidation, improper

172 As above.

173 See, for example, National Election Monitoring Unit *The multi-party general elections in Kenya 29 December 1992: The report of the National Election Monitoring Unit* (1993) 82 ('without exception, all women candidates we observed were harassed by their male political opponents.')

174 See CREAW (n 36 above) 8.

175 As above 7.

176 National Election Monitoring Unit (n 179 above) 82.

177 CREAW (n 36 above) 10.

178 Constitution of Kenya art 81(b).

179 See Constitution of Kenya art 27(6).

influence and corruption.’¹⁸⁰ The Constitution contemplates a framework in which women will be able to vie for elective posts without fear for their physical and psychological well-being. It thus calls for the setting up of structures that would ensure women’s safety in electioneering time.¹⁸¹ Moreover it will be possible to hold accountable those who choose to use violence against women as a political tool.¹⁸²

4.6.3 POLITICAL PARTY FRAMEWORK

Hitherto political parties have been the vehicles through which Kenyans seek political office at all levels whether presidential, parliamentary or civic.¹⁸³ A prospective candidate had first to secure nomination by a political party. However, political parties in Kenya have generally tended to be undemocratic unaccountable outfits that sometimes exist for convenience. It is true that the Political Parties Act¹⁸⁴ sought to streamline political parties but it is questionable whether parties really complied with its requirements. Political parties are male dominated institutions. They are gendered. While some have included women within their structural ranks often this is no more than mere tokenism intended to camouflage the real powers behind them.¹⁸⁵ Those that have women as their chairs are few and far between.¹⁸⁶ Thus the avenue for entry into politics is restricted in the very first instance owing to the usual prejudices against women. The process of nomination often is as gruelling as the real elections if not worse. Routinely political parties shut out women through their nomination process either by requiring exorbitant nomination fees or failing to provide a nomination system devoid of favouritism, intimidation and harassment.¹⁸⁷

180 Constitution of Kenya art 81(e).

181 Constitution of Kenya art 81(e)(ii).

182 As above.

183 The repealed Constitution required that a person had to belong and to be nominated by a political party to qualify to vie for a post. See CREAW (n 80 above) and Odhiambo (n 13 above).

184 See Political Parties Act 2007.

185 CREAW (n 36 above) 7.

186 CREAW (n 36 above) 9; See also Odhiambo (n 13 above) 2-3.

187 CREAW (n 36 above); Odhiambo (n 13 above).

To foster a culture of democracy and hence inclusiveness the Constitution provides a basic framework for political parties.¹⁸⁸ Thus parties must meet certain constitutional standards if they are to participate in elections. In addition to representing a national character and upholding democratic principles through regular and free elections,¹⁸⁹ political parties must 'respect the right of all persons to participate in the political process, including minorities and *marginalised groups*'¹⁹⁰ and more importantly for women they must 'respect and promote human rights and fundamental freedoms, and *gender equality and equity*.'¹⁹¹ This creates a positive obligation on the promoters of political parties to address the gendered imbalances within their ranks. In addition all parties should promote the 'objects and principles' of the Constitution while upholding the rule of law.¹⁹² Moreover a political party that seeks to confine its membership to a particular gender is prohibited. Similarly, a party that 'engage[s] in or encourage[s] violence by, or intimidation of, its members, supporters, opponents or any other person' is proscribed under the Constitution.¹⁹³ Where it is shown that a political party through its officials visits violence on other people or even tolerates violence meted out by its supporters then there will be ground for intervention under the Constitution.¹⁹⁴ It is contemplated that the Independent Electoral and Boundaries Commission will establish a code of conduct to govern political parties over and above any framework legislation that will be passed by Parliament.¹⁹⁵ Both of these frameworks should further refine the nature of political parties and their obligations in terms of promotion of women's roles in elective politics.

There is an important innovation in the new Constitution that should serve to ameliorate some of the difficulties fomented by

188 Constitution of Kenya art 91.

189 As above art 91(1).

190 As above art 91(1)(e).

191 As above art 91(1)(f) (emphasis added).

192 As above art 91(1)(g).

193 As above art 91(2)(a).

194 As above art 91(2)(b).

195 As above art 92.

political party frameworks. In terms of Article 85 a person who is not a member of a political party or has not been such a member for at least 3 months before an election shall be free to stand as an independent candidate. That person should of course satisfy other minimum requirements for election to the relevant body e.g. in case of election to the National Assembly, the support of at least 1,000 registered voters, and in case of election to the Senate, the support of at least 2,000 registered voters.¹⁹⁶ Should the political party prove impervious to a woman candidate it seems that she might take advantage of this opportunity to offer herself for election to a political position. The independent candidature offers women the opportunity to have a stab at an elective position without having to succumb to the gruelling demands that come with political party nomination. If she can raise the capital necessary to run a campaign or if she can be supported by organisations then it is possible that a woman candidate can vie for a political post on terms that are at least less restrictive than those presented by political parties. A similar opportunity has been created with respect to the County Assembly.¹⁹⁷

4.6.4 STRUCTURES OF POLITICAL REPRESENTATION

Article 93 establishes legislative representation at the county and national levels, through the Senate and National Assembly respectively. While each of them has its own competencies they together constitute the Kenya Parliament.¹⁹⁸ The National Assembly is made up of representatives of the 290 constituencies in the country who are elected directly by voters.¹⁹⁹ In addition, each of the 47 counties shall elect one woman to represent it in the National Assembly meaning that 47 seats are reserved for women.²⁰⁰ Further, political parties are allowed to directly nominate 12 members to the National Assembly 'to represent special interests including the

196 As above art 85.

197 As above art 193(1)(c)(ii).

198 As above art 93.

199 As above art 97.

200 As above art 97(1)(b).

youth, persons with disabilities and workers.²⁰¹ The quota system is also adopted for Senate which shall consist of 47 members directly elected by voters in the counties each county being a single member constituency together with 16 women representatives, two youth representatives, a man and a woman, two disabled persons representatives, a man and a woman, and the Speaker.²⁰² Unlike in the National Assembly where the 47 women representatives are elected, the 16 in the Senate are nominated by political parties on the basis of the proportion of the seats held by their members in the Senate.²⁰³ It is not clear whether the four members representing the youth and persons with disabilities are nominated or elected but it would appear that nomination is preferred except that again it is not clear who does the nomination.

The creation of the two levels of government is intended to decentralise power down to the local level. The devolution process is itself subject to requirements of equality. Thus under Article 174 it is said that among the objects of devolution include the promotion of democratic and accountable exercise of power.²⁰⁴ One of the principles of devolved government is said to be gender parity.²⁰⁵ Devolution is to be effected through a county government consisting of a County Assembly and County Executive.²⁰⁶ The County Assembly is made up of representatives of the various wards elected directly by voters in the respective wards in addition to 'the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.'²⁰⁷ The latter should be nominated by political parties in proportion to the seats received by them in the county elections.²⁰⁸ Executive authority in the county is to be exercised by an Executive

201 As above art 97(1)(c).

202 As above art 98.

203 As above art 98(1)(b).

204 As above art 174.

205 As above arts 175 & 197(1).

206 As above art 176.

207 As above art 177(1)(b).

208 As above art 177(2).

Committee headed by a County Governor elected in the general elections.²⁰⁹

The general thrust however is that the Constitution deliberately seeks to ensure that women are included in political decision-making positions. Of course women would also be free to offer their candidature for direct elections to the National Assembly and Senate.²¹⁰ In such a case the framework under the new Constitution anticipates that her candidature will not be bogged down by the structures, institutions and people involved in the whole election gamut. Thus political parties will be required to support her candidature or at least not frustrate it on grounds of sex. The party will be required to facilitate a nomination process that is free from undemocratic practices and violence. The national electoral structures should themselves provide a safe and level playing field as indeed contemplated in the Constitution.

Suffice it to say that the Constitution as a whole imposes a general obligation to every person to respect its principles such as inclusiveness, equality, democracy, open government, respect for others, respect for the rule of law and so on. Ultimately it is hoped that these new initiatives combined will result in an increase in women's representation in political offices which in turn should fundamentally alter the character of political decision-making in Kenya. This is more so when it is considered that Parliament has a very specific constitutional mandate to pass legislation to promote the representation in Parliament of women among others.²¹¹ This should provide an opportunity to refine the constitutional requirements further.

4.6.5 REPRESENTATION IN APPOINTIVE BODIES

Flowing from the general obligation to ensure inclusion of both men and women in public positions²¹² the Constitution has also elaborated the numerical requirements for the institutions it has

209 As above arts 179 & 180.

210 As above arts 97(2) & 98(3).

211 As above art 100.

212 As above art 27(8).

established within its framework. For example, Article 127 establishes the Parliamentary Service Commission consisting of the Speaker of the National Assembly as chairperson, a vice-chairperson, seven members appointed by parliament but nominated by the specified political parties at least three of whom shall be women.²¹³ Two other persons, at least one of whom should be a woman are then appointed by parliament to complete the structure of the PSC.²¹⁴ Another example is the Judicial Service Commission (JSC) which is responsible for among other things the efficient running of the Judiciary. Its composition is also expressed to include women representatives i.e. one of the two representatives of the Judiciary should be a woman.²¹⁵ One of the two persons representing the Law Society of Kenya should also be a woman.²¹⁶ Finally one of two non-lawyer members appointed by the President should be a woman.²¹⁷ One of the principles guiding the JSC in the performance of its functions is 'the promotion of gender equality.'²¹⁸ Another important body established is the Public Service Commission whose function relates to the creation and administration of public bodies and offices. While its composition is not specifically apportioned in terms of gender,²¹⁹ some of the principles that it should foster include fair competition and merit in appointments and promotion subject to 'affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service' of men and women.²²⁰

4.7 APPLICATION, LIMITATION, ENFORCEMENT AND INTERPRETATION OF THE BILL OF RIGHTS AND THE CONSTITUTION

The Constitution does not distinguish between the public and the private insofar as the Bill of Rights is concerned. In the previous dispensation there was a tendency to treat the rights in the bill of

213 As above art 127 (2)(c).

214 As above art 127(2)(d).

215 As above art 171(2)(d).

216 As above art 171(2)(f).

217 As above art 171(2)(h).

218 As above art 172(2)(b).

219 As above art 233.

220 As above art 232(1)(g) and (i).

rights as entitlements against the state and public authorities only. The assumption always has been that the Bill of Rights is a bulwark between the government with its enormous powers and subservient citizens. The problem with this assumption was that it masked violations occurring in the private sphere as not being of concern by the Constitution. The Constitution obliterates this private/public dichotomy and stresses that the Bill of Rights in particular 'applies to all law and binds all State organs and all persons.' The previous Constitution not only lacked this injunction but also exempted personal and customary law from its anti-discrimination clauses.

In addition the Constitution gives significant leeway to courts to expand the reach of any other law to give effect to a fundamental right and freedom. Thus if a statute appears to be partially limiting a right in a manner not contemplated under the Constitution a court would have a clear mandate to develop that statute to remove the inconsistency if possible and extend its application to the right consistently with the Bill of Rights.²²¹ Added on to that is the mandate that courts should adopt an interpretation that 'most favours the enforcement of a right or freedom.'²²² Furthermore, when interpreting the Bill of Rights, a court, tribunal or other authority is required to promote 'the values that underlie an open and democratic society based on human dignity, equality, equity and freedom...'²²³ Specifically with respect to women all state organs and all public officers have a duty 'to address the needs of vulnerable groups within the society, including women...'²²⁴ Even without a specific obligation the government and its officials are required to identify the special needs of women and implement measures that will alleviate the results of a history of women's marginalisation.²²⁵

While the Constitution provides a whole host of rights and entitlements citizens are unlikely to take any steps to enforce them if they do not have the resources to interact effectively with the court system. Thus the rules of enforcement of fundamental rights

221 As above art 20(3).

222 As above.

223 As above art 20(4)(a)(b).

224 As above art 21(3).

225 As above.

have been liberalised such that the most vulnerable members (and women are a vast majority of these) can invoke the court system to enforce their rights. It is not just the person claiming the right who has locus in the courts; other persons may approach the court on behalf of the victim of a violation.²²⁶ Besides the Constitution has a very elaborate mechanism for limitation of rights.²²⁷ The old Constitution had a series of 'claw-back' effects on many of the rights it provided for.²²⁸ These 'claw-back' clauses in the Constitution had the effect of taking by one hand what they had given with the other.²²⁹ A notorious example of course was section 82 which while purporting to outlaw all forms of discrimination based on categories including sex nevertheless exempted from the ban the application of personal and customary laws.²³⁰

The Constitution has changed the normative framework in terms of the hierarchy of laws. At the top the Constitution itself stands supreme.²³¹ Beneath it are all other laws including Acts of Parliament, county law, customary law and cases.²³² Of significance though is the introduction of general rules of international law as well as treaties as part of the normative system in Kenya.²³³ It is important to note that the Constitution is not saying that these latter two legal norms can only be used as aids to interpretation. Rather the Constitution is unequivocally stating that customary rules of international law on the one hand and treaties ratified by Kenya on the other are part of Kenyan law.

Another important distinction to note is that as regards these two sources, customary international law can be applied without qualification. Treaties must have been ratified by Kenya to apply. Even in the latter case it does not mean that a court cannot use a non-

226 As above art 22.

227 As above art 24.

228 See generally K M'Inoti 'The reluctant guard: The High Court and the decline of constitutional remedies in Kenya' *Nairobi Law Monthly* July 1991.

229 M'Inoti (n 234 above).

230 S 82(1) of the repealed Constitution.

231 Constitution of Kenya art 2.

232 As above art 2(4).

233 As above art 2(5)(6).

ratified treaty to interpret the law. It must be recalled that a trend had emerged even before the effective date of using provisions of ratified treaties to interpret the law especially where there were gaps.²³⁴ The possibility that courts will use any treaty for gap-filling purposes is real especially if the treaty presents progressive jurisprudence in a given area. Many principles of law of specific relevance to women are developed in the international arena. Many treaties have been concluded that advance women's rights in one way or the other. The Constitution has thus opened a whole new field of law that can be used to protect Kenyan women. It should also be recalled that Kenyans have for decades been unable to circumvent the strictures of the dualistic approach to international law inherited from the colonial legal system. Significant room has now been created for the direct application of international law on women's issues. Already the courts have been called upon to determine the applicability of international law in Kenya and they have ruled that in accordance with the Constitution treaties when ratified by Kenya are directly applicable.²³⁵

5 GENDER EQUALITY IN CONTEXT

It cannot be doubted that the Constitution has created a framework of law that responds in a very direct and unequivocal manner to the age-old discrimination against women in Kenya. It thus provides a tremendous opportunity for mainstreaming women into the wider Kenyan community. It attacks both public and private acts and decisions that have been used to exclude women from important aspects of life. While it makes general pronouncements that should apply across the board it also allows for women-specific interventions such as affirmative action and numerical quotas in public institutions thus recognising the insufficiency of bare formal equality. Merely providing for gender neutral laws may obscure the

234 See the *Rono* case (n 84 above).

235 See *In Re The Matter of Zipporah Wambui Mathara* [2010] eKLR available at http://kenyalaw.org/Downloads_FreeCases/77605.pdf (the High Court in this case considered the applicability article 11 of the International Covenant on Civil and Political Rights and stated that: 'by virtue of the provisions of section 2(6) of the Constitution of Kenya 2010, International Treaties, and Conventions that Kenya has ratified, are imported as part of the sources of the Kenyan Law.'

structural inequalities that women may face when they attempt to take advantage of the opportunities provided by the law. For example merely saying that every person regardless of sex is free to aspire and vie for a political post ignores that women may lack the necessary resources to engage effectively with the political processes. It is blind to the fact that women are continually bogged down by cultural practices that undermine their leadership capacity. It would also be oblivious to the fact that the violence and intimidation that generally accompanies Kenya's electoral process makes it hard for women to choose politics as a career.

So is there cause to celebrate? Have women 'arrived' in terms of the quest for gender equality? The answer to the first is a definite yes. On the whole, the Constitution is definitely a new beginning for women's rights in Kenya and the future should be bright. Without detracting from the generally woman-friendly trajectory of the dispensation one might mention some inconsistencies that may yet prove significant. In terms of appointment of certain public officials the Constitution is silent on whether any gender concerns ought to be taken into account. For example in the run-up to an election for President and Governor, the prospective candidates are not obliged to choose a person of the opposite sex as a running mate. Hopefully candidates will deem it appropriate to consider this fact when running for the relevant office always remembering that the thrust of the Constitution is equality and equity in gender representation. A similar concern may be raised with respect to certain appointive positions in both the national and county governments. Appointments of cabinet secretaries do not have to comply with any gender requirements.

It might be said that the Constitution provides a generalised obligation that cuts across the board. But it must also be remembered that the neutrality in law is not necessarily neutrality in practice. The appointments of the Attorney General, the Director of Public Prosecutions, the Chief Justice and Deputy Chief Justice appear not to be directly amenable to equity requirements. The Commission on Revenue Allocation and the Salaries and Remuneration Commission appear to have escaped scrutiny insofar as equality requirements are concerned. Significantly though, the principles on

public finance as well as those on equitable sharing of revenues pay more premium to regional and group equity on the assumption that the anticipated trickle-down effect will ensure the relevant economic benefits reach women.

There are other provisions that will likely present ambiguities if not difficult challenges in terms of application and interpretation of the Bill of Rights and other constitutional guarantees. While on the one hand the Constitution bars discrimination based on any cultural or religious practises²³⁶ it on the other hand recognises 'culture as the foundation of the nation and the cumulative civilization of the Kenyan people.'²³⁷ In addition the state is obliged to 'promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage.'²³⁸ While this section has a wider application the question would be whether it obligates the state to recognise cultural expressions that may produce discriminatory consequences.

It will be pointed out that Article 2 will subordinate such culture to the Constitution. However, read together with other provisions courts will be hard pressed to weigh between the cultural identities of groups and the need to enforce human rights. For example Article 44(1) allows every person 'the right to use the language, and to participate in the cultural life, of the person's choice.' Moreover a person belonging to a cultural or linguistic community has the right with other members of the that community to enjoy his or her culture and use his or her language or form, join and maintain cultural and linguistic associations and other organs of civil society.²³⁹ Courts and public officials will have to contend with the claim by cultural groups for their identity as against the claim of individual members thereof to enjoy the civil and political rights. This represents the

236 Constitution of Kenya art 33(4) provides that 'A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion.' Art 44(3) provides that 'A person shall not compel another person to perform, observe or undergo any cultural practice or rite.'

237 Constitution of Kenya art 11(1).

238 As above art 11(2)(a).

239 As above art 44(2)(a) & (b).

classical dilemma between cultural relativism and universalism of fundamental rights. Coomaraswamy notes this dilemma thus:²⁴⁰

For many women, their sense of identity arises as a result [of] their experience as women, living within groups primarily governed by men. Though their sense of self and dignity comes from how the wider society treats women, they often have to face discrimination within local groups. They may have to submit to discriminatory practices and laws, as well as engage in rituals, customs, and habits that reinscribe the subordinate status of women within the hierarchy of their religious, ethnic, or tribal identity. Many women acquiesce because they see their group identity as the most important aspect of their lives. Others resist, only to be branded as traitors or “bad women” who bring the group into disrepute.

A more ambivalent and hence problematic provision that is perhaps reminiscent of the claw-back clauses in the old order is the exception under Article 24(5) which applies to persons prophesying the Muslim faith. That article provides that:

The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis’ courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

This provision clearly hacks back to the ‘personal law’ exception in the repealed Constitution.²⁴¹ It must be recalled that this exception is what formed the basis for the application of discriminatory customary law and practices. If the personal law exception was removed with respect to customary laws retaining the same with respect to Muslim law is hardly justifiable especially since it applies to the family which quite often is the focal point of inequality. When this exception is coupled with the Article 32 ‘right to freedom of belief, religion, thought, belief and opinion’ enforcing the equality provisions of the Constitution becomes rather problematic. It then appears like the Constitution is giving a right with one hand and taking it away with the other. It makes it difficult for public officials let alone courts to determine the threshold at which they intervene.

240 R. Coomaraswamy ‘Identity within: Cultural relativism, minority rights and the empowerment of women’ (2002) 34 *George Washington International Law Review* 484.

241 See s 82(4) of the repealed Constitution.

While such intervention may be relatively easy when a person is being forced to participate in some cultural or religious ritual the applicable standards become elusive when such participation is seemingly voluntary.

6 CONCLUSION: THE WAY FORWARD

Defining rights on paper is one thing, making them real is a different ball game altogether. Recalling always that the ultimate objective is to mainstream women into the wider Kenyan fabric, there is need to build on the foundations laid by the Constitution. A legal framework that clearly addresses gender inequality is now in existence. However, if the goal of equality is to be meaningful, further steps will have to be taken. For instance, the Constitution contemplates the passage of various pieces of legislation to flesh out some of the rights it provides for. These include legislation on citizenship, culture, leadership, representation of marginalised groups, land, political parties. To the extent that these pieces of legislations affect women there will be need to ensure that they are in consonance with the Constitution. Women, their representatives, members of Parliament and civil society organisations must guard against the risk of dilution of the rights enshrined in the basic law by the expected legislation.

In addition there are many statutes that are clearly contrary to the spirit and intendment of the new constitutional framework. The Law of Succession Act is one such law that perpetuates inequalities between men and women. While the transitional clauses under the Constitution provide that the all the laws in force before the effective date shall be 'construed with the alterations, qualifications and exceptions' necessary to bring them into conformity with the Constitution such construction can effectively be done by the courts. Having in mind the broad *locus standi* provisions it is possible that the non-conforming laws may be interpreted and clarified through public interest litigation launched by civil society organisations, individuals or even groups representing women. Such an eventuality should allow the courts to exercise the wide interpretative jurisdiction granted to them under the Constitution.

A major drawback in the Constitution is the Article 24(4) exception relating to persons professing the Muslim faith. The assumption that equality assumes a different character in the face of religion does not seem to be justified. In any event the qualification is not clearly spelt out as it is expressed to apply to 'the extent strictly necessary for the application of Muslim law.' It seems to give significant leeway for the application of religious laws in matters of 'marriage, divorce and inheritance.' These matters falling within the realm of personal law will likely give room for perpetuation of past practices of discrimination against women. This exception does not seem to comport with the values and aspirations encapsulated in the various provisions of the Constitution envisaging an egalitarian society that treats men and women equally. Considering that the section 82(4) personal law exception in the previous Constitution was never retained it is not clear why another personal law exception had to be created under Article 24(4) of the new Constitution.

For rights to be meaningful the subjects must be able to claim them. To claim them the subjects must not only know of those rights but also understand them. This calls for legal literacy—a process by which citizens, in this case women, are made aware of the rights obtaining under the new framework and are empowered to claim them. The civic education that facilitated the referendum process will have to be sustained except that this time it will have to focus on women. It will be recalled that the Government took very specific measures that included public education and dissemination of the proposed Constitution. The Government can show the same commitment in educating women of the entitlements under the Constitution. This should be done through the Government agency in charge of gender matters (either a minister or cabinet secretary when constituted).

CHAPTER FIVE

LAND AND THE ENVIRONMENT

TOM OJIENDA* & MATHEWS OKOTH**

1 INTRODUCTION

Land holding, access and use as well as the need to sustain the environment influenced Constitution-making process in Kenya. Previously, Government control of land ownership as sanctioned by the repealed Constitution¹ and related land laws² was a recipe for not only inequitable land ownership, but also illegal distribution of public land. Land in cities, municipalities, townships and government lands were indiscriminately apportioned by successive Commissioners of Lands who would abuse the presidential discretion to apportion such lands.³ Land acquired for public use was illegally allocated through forged letters and documents.

Whereas third party purchasers for value without notice would ultimately acquire good title to illegally allocated land,⁴ they nevertheless frustrated the process of recovery of the illegally

* LLB (Nairobi); LL.M (Kings College); LL.D (UNISA). Ojienda is a Senior Lecturer at the School of Law, Moi University, and a Commissioner with the Truth Justice and Reconciliation Commission (TJRC).

** LLB (Moi); Dip KSL. Okoth is a researcher and an Advocate with Mohammed and Muigai Advocates.

1 S 117 of the Constitution of Kenya (repealed) empowers a county council to set apart land vested in that county council for occupation by a public body or authority for public purposes; or by any person or persons for a purpose which in the opinion of that county council is likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in that county council.

2 Government Lands Act (Cap 280) Laws of Kenya, s 3 authorises the President to unilaterally make grants or dispositions of any estates, interests or rights in or over un-alienated Government land. Such power may be delegated to the Commissioner for Lands by the President.

3 'Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land' Government Printers June 2004 81. (Hereafter 'Ndungu Report')

4 See *Pilcher vs. Rawlings* (1872) 7 Ch App 259. Innocent third party purchaser for value without notice acquires good title.

allocated land.⁵ State corporations were used as conduits for land grabbing through which the public lost colossal amounts of money. Whereas land allocated to State Corporation is 'alienated land' such land would ultimately be illegally allocated to individuals or private companies. The land would be sold at less than market value to allottees, who would then re-sell it to other state corporations at exaggerated costs.⁶ Government ministries and departments in cohort with successive Commissioners of Lands would cause to be allotted their respective ministries lands.⁷ Settlement Schemes were distributed to non-beneficiaries by Settlement Fund Trustees and District plot Allocation Committees,⁸ while Trust lands, which legally are held by local authority in trust for the local benefit of residents of the local authority, were illegally allocated to individuals and companies by county Councils in cohort with

5 Ndungu Report (n 3 above).

6 As above 89-90. The Commission identified the state corporations that lost large areas of land under dubious circumstances to include Kenya Railways, Kenya Airports Authority, Kenya Agricultural Research Institute, Kenya Power and Lighting Company, Kenya Industrial Estates and Kenya Food and Chemical Corporation.

7 Ndungu Report (n 3 above) 112-113. The Commission identified the affected Ministries to include Ministry of Livestock and Fisheries Development, National Youth Service and Kenyatta International Conference Centre.

8 R. Southall 'The Ndungu Report: Land & graft in Kenya' (2005) *Review of African Political Economy* 146-147. According to the author: 'Allocation of plots, formally conducted under Settlement Fund Trustees, devolves in practice upon District Plot Allocation Committees composed of the District Commissioner, District Settlement Officer, District Agricultural Officer, the area MP, the Chairman of the relevant County Council and the Clerk to Council. Settlement Fund Trustees appear to lack any supervisory powers over these committees, with the result that the local committees have been almost wholly unaccountable. The result has been predictable, with the interests of the landless having been ignored in favour of those of "District officials, their relatives, members of parliament, councillors and prominent politicians from the area, Ministry of Lands and Settlement officials, other civil servants and ... so called 'politically correct' individuals." And whilst the majority of deserving allottees received smaller plots, the undeserving often received large ones. Meanwhile farms belonging to the Agricultural Development Corporation, designed to provide on the needs of the agricultural industry by developing high quality seeds or livestock or undertaking research etc, have been illegally established as settlement schemes and subsequently illegally allocated to individuals and companies, often as political reward or patronage.'

successive Commissioners of Lands.⁹ Forestlands, national parks, game reserves, wetlands, riparian reserves and protected areas were illegally and irregularly excised.¹⁰ Public land was therefore grabbed ‘in total disregard of the public interest and in circumstances that fly in the face of the law’ and ‘rewarded’ by political patrons to politically correct individuals.¹¹ Courts were used as a shield to protect the illegally acquired land under the pretext of ‘first registration.’ Cases such as *Ambale v. Masolia*¹² and *Mugogo v. Sihowa*¹³ handed down the unfortunate jurisprudence that ‘even if fraud had

9 Ndungu Report (n 3 above) 134–135. See also ‘Report of the Interim Coordinating Secretariat, Mau Forests Complex’ 26th February 2010. See also K Mungai ‘The obstacles in the fight against corruption in Kenya’ in T Ojienda (ed.) *Anti-Corruption and good governance in East Africa: Laying foundations for reform* (2007) 135. While quoting the late JM Kariuki, the author states: ‘I am sounding this as a warning and it should be taken seriously that this greed is going to ruin us!...it is the policy of the government to settle people who are landless and not the people who own land somewhere else. Where will our poor men go if we are to continue at this rate? In fact, I can see this country is going to disregard the poor persons for good if leaders are being too greedy. They have gone as far as Maasai land saying that they are doing experiment whereas the whole of Maasai land has been taken by those greedy people under the pretext of training the Maasai to become farmers. I call this “robbing” because, how can you take land as much as 3000 acres under the pretext that you are experimenting for five years?...I would like to state that the majority of these people are well-to-do and hold high positions in government... The Provincial Commissioner for Central province has an experiment farm there. Some of our Permanent Secretaries have farms there. Some of the Cabinet Ministers have farms there. It is not a secret. The mistake in this country is that we are trying to hide a lot of things...’

10 Ndungu Report (n 3 above) 148–169. The Commission observed that: ‘only 1.7% of the 3% of the country which was covered by gazetted forests at independence remains, most of the reduction having come about as a result of illegal and irregular excisions, usually made without any reference to scientific considerations or under the guise of settlement schemes. The beneficiaries of such excisions include (often private) schools, government institutions, and religious bodies as well as private individuals and companies. Similarly, many illegal allocations of land around riparian sites have been illegally allocated by the Kenya Wildlife Service, with many such allocations – such as those made since 1995 to some 14 beneficiaries around Lake Naivasha – being known to have severely affected the ecosystem.’

11 Ndungu Report (n 3 above) 8 & 14.

12 (1986) KLR 241.

13 (1988) KLR 1.

been established, inasmuch as the respondent's title was acquired by first registration, it could, in no circumstances be defeated.¹⁴

Land was inequitably distributed and certain communities felt that individual interests in land were more protected at the expense of their group interests.¹⁵ Pastoralists' land were no longer managed through sustainable norms, rules, beliefs and practices of indigenous communities,¹⁶ but through "legal-structural authoritarian-rights that emphasised individual tenure and de-emphasised community land rights."¹⁷

At the Coast, the colonial government leased the ten mile coastal strip from the Sultan of Zanzibar subject to the rights of the

14 It is not worthy that in *Karanja Kariuki vs. Kariuki* (1983) eKLR, Justice Madan held that where a customary land trust exists, registration of land even as a first registration does not exempt the proprietor from obligations as a trustee of the customary land. That first registration does not exclude recognition of a trust provided it can be established. That in protecting first registration, Parliament could not have intended to destroy this customary land trust of one of the largest sections of the peoples of Kenya.

15 See the Report of the Commission of Inquiry on Post Election Violence (CIPEV) 31. The Report noted, 'Constitutionally, individuals may own land in any place in Kenya and in law no part of the country belongs to an ethnic group. Nevertheless, this phenomenon is *de facto* a characteristic of many areas, particularly as many of the newly created districts since the nineteen nineties have been ethno-specific, leading to the creation of ethnically homogenous effective "native reserves". This in turn has created the notion of "insiders", who are native to a place and "outsiders" who have migrated there, a notion that has been tapped by aspiring politicians. This raises the question of the balance between group interests and the rights of individuals as entrenched in the Constitution, a problem that also has crept into slums such as Kibera and Mathare which are now informally divided into ethnically homogeneous zones.'

16 I Lenaola *et al* 'Land tenure in pastoral lands' in C Juma & J B Ojwang (eds.) *In Land We Trust: Environment, Property and Constitutional Change* (1996) 236.

17 H.W. O. Okoth-Ogendo *Tenants of the Crown: Evolution of agrarian law and institutions in Kenya* (1991) 170. According to the author, 'Two phases are clearly identifiable in the case of developments in the property law area before 1939. The earlier phase, which ends up around 1915, was one simply of legal security to land both for the African and for the settler. In order for the latter to obtain this, it was in the nature of colonial power relations that the former should lose it. The manner in which this was done whether by sheer brutality or the distortion of proprietary values of the Africans-is not is not of particular consequence. The concern was to found and organise an economy which never really got off its feet even after 60 years of one of the most systematic forms of exploitation ever experienced under the British imperial emblem...correlation between economic instability and legal structural authoritarianism is one which explains the characteristic of much of early colonial law not only in the field of property relations, but in other areas as well.'

inhabitants, who were mostly Arab settlers.¹⁸ In order to distinguish between private land and crown land situated within the ten mile coastal strip,¹⁹ the colonial Government enacted the Land Titles Act.²⁰ The indigenous Mijikenda communities were in the process rendered squatters as they were not Arabs.²¹

Women's rights to land were unequal to those of men in Kenya.²² Their rights to own, inherit, manage, and dispose of land were under constant attack from customs, laws, and individuals including government officials who believe that women cannot be trusted with or do not deserve property. The devastating effects of property rights violations including poverty, disease, violence,²³ and homelessness harm women, their children, and Kenya's overall development. Many women were excluded from inheriting, evicted from their lands²⁴ and homes by in-laws, stripped of their possessions,

18 According to the Report of the Parliamentary Committee released in 1978, adjudication of claims at the Coast under the Land Titles Ordinance, 1908, caused landlessness by indigenous people in the ten mile coastal strip. The Ordinance ruled out the possibility that the Mijikenda and non-Mazrui Arab communities could ever acquire title or be guaranteed access to land.

19 M P K Sorrenson *Land reform in the Kikuyu country* (1967) 201.

20 1908, later, Land Titles Act.

21 K Kanyinga *Redistribution from above: The politics of land rights and squatting in Coastal Kenya* (2000) 56. According to the author: 'The arrival of the British and the establishment of the protectorate status helped the subjects of the Sultan to consolidate their control of land along the coast in disregard of the possessions of the indigenous Mijikenda groups. The 1886 Anglo-German Agreement, which created *Mwambao*, specifically gave the Sultan rights over land in the Strip and made no attempts at preserving Mijikenda land rights. The declaration of the Protectorate in 1895 and the subsequent lease of the Coastal strip to the Protectorate by the Sultan was followed by the formal acknowledgement, in principle and practice, of the private possessions of Arabs and Swahili, thereby laying the socio-political and administrative bases for the exclusion of Mijikenda rights to land on the coast in general and along the strip in particular.'

22 United Nations Development Programme *Kenya Human Development Report 2001* (2002) 30. See also Republic of Kenya 'Poverty reduction strategy paper for the period 2001-2004' (2001) 36. The paper states in part: '...Only 29 percent of those engaged in formal wage employment are women, leaving most to work in the informal sector with no social security and little income.'

23 J Tony *Domestic abuse in Kenya* (2002) 10. The author states: 'Violence against women is commonplace: 60 percent of married women reported in a 2002 study that they are victims of domestic abuse...'

24 C Nyamu-Musembi 'Are local norms and practices fences or pathways? The example of women's property rights' in A An-Na'im (ed.) *Cultural transformation and human rights in Africa* (2002) 136.

and forced to engage in risky sexual practices in order to keep their property.

Failure to implement the recommendations of the Ndungu Report exacerbated the frustrations in dealing with land tenure disputes. In *Mureithi v. Attorney General & 4 others*²⁵ where members of Mbari-ya-Murathimi clan in Nyeri sought judicial review orders against the Attorney General and the Commissioner of Lands to implement the recommendations of the Ndungu Report in as far as it touched their land, the Court rendered itself that the Attorney-General and the Commissioner of Lands were under no statutory duty whatsoever to implement the recommendations of the Ndungu Report.

This chapter interrogates the procedure for land and environment governance under the repealed Constitution and related laws and under the new Constitution. Part One analyses how land and environment were governed under the repealed Constitution and the related laws. Part Two lays an outline of the provisions of the Constitution on land. Part Three examines how the new Constitution transforms the institutions that formerly administered land and environment and the extent to which the new Constitution lays the framework for addressing historical injustices in land and environment. Part Five identifies crucial areas for amendment in the existing land laws to align them to the new Constitution.

2 LAND ACQUISITION AND GOVERNANCE IN KENYA FROM COLONIALISM TO THE EFFECTIVE DATE OF THE NEW CONSTITUTION

2.1 PRE-INDEPENDENT KENYA

When the British declared a protectorate status over East Africa on 15th June 1895, the power to acquire title to and deal with resources in the East African region remained unresolved; the British had to conquer, enter into agreements, treaty or purchase land from

25 [2006] 1 KLR (E & L) 707. The court argued that once the President is presented with the report of a Commission of Inquiry, he has complete discretion on what to do with it and he is not obliged to respond in any particular way. That it is not the mandate of court to formulate and implement policy matters as this is the mandate of the Executive and Parliament.

the natives for it to have control over land in the East African protectorate.²⁶ The listed mechanisms for land acquisition were however abandoned by the British administrators as soon as they were invented as Africans were considered to have only occupational rights over land, not title thereof; no sale, private treaty or agreement over land could be entered into with Africans for a title they never had.²⁷ As a consequence, the British devised methods that would legitimise compulsory acquisition of land, particularly beyond²⁸ the ten mile coastal strip. The Colonialists extended the application of the Indian Land Acquisition Act to the East African Protectorate to justify compulsory acquisition of the natives' land notwithstanding the serious doubts expressed by the Foreign Office as to the legality of such action.²⁹

In 1902, the Crown Land Ordinance was enacted to enable the Settlers acquire freehold title or long leases over land in the protectorate. Whereas the Ordinance prohibited issuing grants over land actually occupied by the natives, there was a sustained pressure to evacuate the natives over land deemed suitable for European settlement.³⁰ The natives were thus grouped into reserves removed from the Europeans and Settlers. As Okoth Ogendo notes, the colonial administration deliberately failed to guarantee any boundaries to the reserves to allow for shrinking of the reserves whenever need arose in the future.³¹

In 1908, the Crown Land Ordinance, 1902 was amended to empower the Governor to reserve crown land required for use or support of natives from disposal. The Governor had unlimited

26 According to H W O Okoth-Ogendo *Tenants of the Crown: Evolution of agrarian law and institutions in Kenya* (1991) 9, declaration of protectorate status only conferred political jurisdiction over the territory. Rights over land could only be acquired through conquests, agreement, treaty or sale.

27 Sorrenson (n 19 above) 47.

28 In 1888, the Sultan of Zanzibar signed a Concession Agreement with the Imperial British East African Company (IBEAC) ceding all land rights within the ten miles Coastal Strip to the company subject to private tenure of the subjects of the Sultan of Arab descent.

29 See the East African Order in Council, 1897 and Application to Natives of Indian Acts Ordinance No. 2, 1903.

30 Y P Ghai & J P McAuslan *Public law and political change in Kenya* (1970) 90.

31 As above 31.

discretion to revoke at any time a gazette notice restraining the disposal of any crown land if in his opinion, such land was not being used by or was not supporting natives.³² Each reserve was managed by three trustees appointed by the Governor and who remained in office at the discretion of the Governor; the natives held land as beneficiaries of a trust set up by the State.³³ In a bid to distinguish between private land and crown land situated within the ten mile coastal strip at the coast, the colonial government promulgated the Land Titles Ordinance, 1908. The Ordinance facilitated alienation of crown land at the coast.³⁴ Successful claimants of private land were issued with Certificates of Ownership giving freehold titles over the private land, or Certificates of Mortgage or Interest covering leaseholds.

In 1915, the Crown Land Ordinance, 1915, was passed to declare all land in the protectorate, including the reserves, crown land³⁵ and to give the settlers 999 year leases.³⁶ It was obligatory for a European landholder to covenant that he would not, without the consent of the Governor, appoint or allow a non-European to be a manager or otherwise to occupy or to be in control of the land leased.³⁷ Inter-racial dealings in land had to be vetoed by the Governor³⁸ to safeguard against alienation of land to 'non-community members' whose presence in such land would 'prejudice the country as a whole.'³⁹ Alongside the Crown Land Ordinance, 1915, the colonial Government promulgated the Registration of Documents Ordinance, 1915, to facilitate the registration of documents relating

32 As above.

33 As above.

34 M P Sorrenson *The origins of European settlement in Kenya* (1968).

35 Crown Land Ordinance, 1915, s. 5 defines crown land to mean 'all public land in the protectorate which are for the time being subject to the control of His Majesty by virtue of any treaty, convention or agreement, or by virtue of His Majesty's protectorate, and all lands which shall have been acquired by His Majesty for the public service or otherwise howsoever, and shall include all land occupied by the native tribes of the protectorate and all lands reserved for the use of the members of any native tribe.'

36 Crown Land Ordinance s 34.

37 As above s 39.

38 As above ss 71 & 73.

39 Minutes of the Proceedings of the 3rd Session of the Legislative Council (1913) 17.

to transactions involving alienated crown land. The Ordinance set up registration registries in Nairobi and Mombasa.⁴⁰

In a bid to guarantee security of tenure, the Registration of Titles Ordinance was passed in 1919. Previously, right over land was signified by way of a registration certificate⁴¹ and later, a certificate of ownership, mortgage or interest.⁴² The passing of the Registration of Titles Ordinance, 1919 phased out the system of registration of documents to a system of registration of title to land.⁴³ Settlers wanted a secure title to land as a pre-condition for investment. It is for this reason that a Certificate of Title issued under the 1919 Ordinance was declared a conclusive evidence of proprietorship of land save on grounds of fraud or misrepresentation to which the proprietor was a party.⁴⁴ Suffice to note, acquisition of private title to land did not extend to Africans.⁴⁵

In 1920, Kenya became a colony. Natives were thus rendered tenants at will of the Crown. There was a lot of unrest in the native reserves as Africans had no rights in land and control over its administration. Security of the Colonial Government and the settlers was at risk, thus the colonial Government had to device

40 T Ojienda *Conveyancing principles and practice* (2008) 21.

41 See the Registration of Documents Regulations No. 14 of 1986 which provided for issuance of registration certificates as evidence of occupancy rights over land.

42 See Ordinance No. 11 of 1910.

43 See Ordinance No. 26 of 1919.

44 S 23 of the Registration of Titles Act (Cap 281) provides that: '(1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party. (2) A certified copy of any registered instrument, signed by the registrar and sealed with his seal of office, shall be received in evidence in the same manner as the original.'

45 See the judgment of Chief Justice Barth in *Isaka Wainaina Wa Githomo and another v. Murito Wa Indangara & 2 others* [1922-23] 9 KLR 102, where the Court held that: 'the effect of the crown Land Ordinance, 1915 and the Kenya (Annexation) Order-In-Council, 1920 by which no native private rights were reserved...is clearly *inter alia* to vest land reserved for the use of a native tribe in the Crown. If that be so, then all native rights in such reserved land, whatever they were, disappeared and natives in occupation of such Crown land become tenants at the will of the Crown of the land actually occupied which would presumably include land on which huts were built with their appurtenances and land cultivated by the occupier- such land would include the fallow.'

strategies to enlist loyalty of the natives within the native reserves.⁴⁶ The Native Land Trust Ordinance No. 9 of 1930 was passed conferring beneficial occupational title in land to the natives within their respective reserves ‘forever.’⁴⁷ The Native Land Trust Board, consisting of the Governor as Chair, and ten other persons, including one African ‘if any could be suitable,’⁴⁸ administered native reserves.⁴⁹ Under the Native Land Trust Board were Local Advisory Boards chaired by the Provincial Commissioner, and comprising a European and an African nominated by the Governor.⁵⁰ In the event that land within the native reserves was to be set apart by the Crown, compensation ‘for disturbance and for buildings or crops destroyed or damaged’ would be given to the affected natives, not for the open market value of the land compulsorily acquired.⁵¹

The Native Land Trust Ordinance No. 9 of 1930 did not silence the unrest among Africans. When gold was discovered in Kakamega in 1932, the Colonial Government re-settled the affected natives in Kakamega in an already crowded native reserve without compensation.⁵² The discontent among Africans was precipitated. A Commission was formed,⁵³ and its recommendations adopted in two Ordinances— the Native Trust Land Ordinance, 1938⁵⁴ and the Crown Land (Amendment) Ordinance No. 27 of 1938. The former Ordinance redefined ‘native reserves’ as ‘native lands’ and the ‘native lands’ were removed from the definition of Crown Land.⁵⁵ The latter Ordinance created additional categories of land, including ‘native reserves’, ‘temporary reserves’ and ‘native leasehold areas’ out of

46 See the ‘Report of the Commission on Closer Union of Dependencies in Eastern and Central Africa’ (1929) 39. (Hereafter ‘Hilton Young Commission Report’).

47 See Native Land Trust Ordinance No. 9 of 1930.

48 Ghai & McAuslan (n 30 above) 90.

49 Native Land Trust Ordinance No. 9 of 1930 s 3.

50 As above s 6.

51 As above s 11(3). No direct compensation was available in cases of temporary setting apart of land within the native reserves, for instance, for purposes of exploration of minerals. Compensation for such temporary setting apart would be made to the native council in the hope that the affected natives would consequently benefit from the compensation.

52 See Okoth-Ogendo (n 26 above) 58.

53 See the ‘Report of the Kenya Land Commission’ (1934). (Hereafter ‘Carter Commission’).

54 Ordinance No. 28 of 1938 repealed the Native Land Trust Ordinance No. 9 of 1930.

55 Native Trust Land Ordinance 1938.

Crown Lands for future use by Africans.⁵⁶ One misfortune about the reserves is that the boundaries of the reserves were fixed along tribal lines.⁵⁷

Towards independence, the colonial government restructured property rights in the reserves by introducing individual tenure in the reserves and intensifying agricultural production in other areas, through the famous Swynnerton Plan.⁵⁸ According to Okoth-Ogendo, the objective of the Plan was to ensure that Africans made sufficient returns on their small plots of land and abandoned their incessant demand for redistribution of European-held land.⁵⁹ In 1956, the Colonial Government promulgated the Native Land Tenure Rules which empowered the Minister for African Affairs to adjudicate and consolidate areas within native lands where in the opinion of the Minister, rightful landholding existed.⁶⁰ Every land owner named in the adjudication register would be registered as a freehold owner of the land concerned.⁶¹ Occupational rights under customary law shown the adjudication register were deemed to have been converted into tenancy from year to year. Occupational rights under customary law not shown in the adjudication register were deemed extinguished.⁶²

2.2 POST-INDEPENDENT KENYA

At independence, the Registered Land Act, 1963, was enacted intentionally to replace other land registration regimes in Kenya.⁶³ The Act emphasised individual tenure, though in 1968, the Land

56 Crown Land (Amendment) Ordinance No. 27 of 193 s 4.

57 See the Native Authority Ordinance No. 20 of 1940 s 3 which empowered the Provincial Commissioner to order any African found cultivating land outside his reserve to return to his native reserve.

58 R.J.M. Swynnerton Plan, 1954.

59 Okoth-Ogendo (n 26 above) 69.

60 Native Land Tenure Rules 1956 Rule 2.

61 Native Lands Registration Ordinance (No. 27) of 1959 s 33.

62 As above.

63 Registered Land Act (Cap 300) Laws of Kenya s 2 states: 'This Act shall apply to— (a) every area to which, immediately before the commencement of this Act, the Land Registration (Special Areas) Act applied; (b) any area to which the Land Adjudication Act is, on or after the commencement of this Act, applied; (b) any area to which the Land Adjudication Act applies; (c) any area to which the Minister may, by order, apply this Act; and (d) all land which from time to time is set apart under section 117 or section 118 of the Constitution.'

Adjudication Act⁶⁴ was amended to provide for adjudication of group rights. Group rights were to be registered under the Land (Group Representatives) Act⁶⁵ in pastoral and nomadic communities. The penultimate tenure⁶⁶ regimes in Kenya therefore, under the repealed Constitution were:

- (a) Public tenure;
- (b) Customary tenure; and
- (c) Private tenure.⁶⁷

2.2.1 PUBLIC TENURE

Public tenure refers to land held by Government as the private landowner.⁶⁸ In common parlance, public tenure is called Government land.⁶⁹ As earlier indicated, native reserves fell within the definition of 'Crown Lands'⁷⁰ until 1938 when, vide the Crown Lands (Amendment) Ordinance, 1938, native reserves were renamed 'native lands' and divorced from the definition of Crown lands. The management of the native lands was vested in the independent Native Lands Trust Board established under the Native Lands Trust Ordinance of 1938. At independence, the land initially under 'native reserves' became Trust Land, whose management we discuss hereunder.

64 (Cap 284) Laws of Kenya.

65 (Cap 287) Laws of Kenya.

66 According to Kivutha Kibwana, land tenure refers to a country's system of landholding and therefore the terms on which land is held; it describes the physical and proprietary relationships between an individual or a group to land and land rights. See K Kibwana 'Land tenure, spontaneous settlement and environmental management in Kenya' in S C Wanjala (ed.) *Essays on land law: The reform debate in Kenya* (2000) 109.

67 Government of Kenya 'Sessional Paper No. 3 of 2009 on National Land Policy' (2009) paragraph 3.3.1.

68 D B Ogolla & J Mugabe 'Land tenure systems and natural resources management' in C Juma & J B Ojwang *In land we trust: Environment, private property and constitutional change* (1996) 104.

69 S 2 of the Government Land Act (Cap 280) defines 'Government Land' as: 'land for the time being vested in the Government by virtue of sections 204 and 205 of the Constitution (as contained in Schedule 2 to the Kenya Independence Order in Council, 1963), and sections 21, 22, 25 and 26 of the Constitution of Kenya (Amendment) Act, 1964.'

70 See Crown Lands Ordinance, 1915.

Government land was exclusively vested in the President. The President had the exclusive power to grant or dispose of any estates, interests or rights in or over unalienated government land.⁷¹ The Presidential powers could be delegated to the Commissioner of Lands in limited circumstances.⁷² Unlike Trust land which, as we shall see shortly were held in trust of the residents of the local authority, the notion of Government land did not codify trusteeship in the President as a trustee of government land on behalf of the entire public. It is for this reason that B.D. Ogolla & J. Mugabe argue that government had a *carte blanche* in dealing with Government land.⁷³

2.2.2 TRUST LANDS

Trust lands in Kenya are regulated by the Trust Lands Act.⁷⁴ Such lands were formerly the 'native reserves' under the colonial administration.⁷⁵ Trust Lands are spread out in various districts, town councils and high potential agricultural regions in Kenya.⁷⁶

71 Government Lands Act (Cap 280) s 3 states: 'The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may— (a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated Government land; (b) with the consent of the purchaser, lessee or licensee, vary or remit, either wholly or partially, all or any of the covenants, agreements or conditions contained in any agreement, lease or licence, as he may think fit, or, with the like consent, vary any rent reserved thereby; (c) extend, except as otherwise provided, the time to the purchaser, lessee or licensee for performing the conditions contained in any agreement, lease or licence liable to revocation for such period, and upon such terms and conditions, as he may think fit, and the period so extended, and the terms and conditions so imposed, shall be deemed to be inserted in the agreement, lease or licence and shall be binding on the purchaser, lessee or licensee, and on all transferees, mortgagees, assignees and other persons claiming through him.'

72 As above.

73 Ogolla & Mugabe (n 68 above).

74 (Cap 288) Laws of Kenya.

75 Ogolla & Mugabe (n 68 above).

76 Kenya Human Rights Commission *Who owns this Land? A guide to understanding the law of Trust Lands in Kenya* (1997) 1-2. According to the author, Trust Lands are found in Moyale, Wajir, Samburu, Tana River, Marsabit, Garissa, Turkana, Isiolo, Mandera and Trans Mara districts; they are found in Taveta, Pokot, Mosop, Tinderet, Elgeyo, Marakwet, Baringo, Olenguruone, Mukogodo, Elgon local and Kuria Area Councils, Makuani Trust Land Area, Athi River Utilisation Trust Land Area, Lambwe Valley Trust Land Area, Sarora Trust Land, Kaimosi Trust Land, Meru Concessional Trust Land Area, Irrigation Trust land Areas of Pekerra area in Baringo District, Mwea Tabere in Embu District, North Yatta, Yatta Plateau and Ithanga Trust Land, Isiolo Trust Land, Olenguruone Trust Land, and Shimba Hills Trust land in Kwale District.

Trust lands are administered by County Councils for the benefit of residents of the councils. The Councils are therefore trustees of Trust Lands for the benefit of the residents of the Councils. Each County Council has the power to divide land within its jurisdiction into Divisions, with each division administered by a Divisional Land Board.⁷⁷

The law empowered Commissioner of Lands to execute, on behalf of the Council documents relating to grants, leases, licenses and any other documents relating to Trust Land whenever necessary as an agent of the County Council and only upon direction by the Council.⁷⁸ Trust Land may be set apart by County Council or by government through a Presidential Notice.

Pursuant to Article 117(1) of the Constitution of Kenya, a county council is the one empowered to set apart land vested within the council to a public body, public authority, for public use, for purposes of prospecting for or extraction of minerals or mineral oils, or for purposes which in the opinion of the county council is beneficial to persons ordinarily resident within the county council. Setting apart extinguishes rights, interests and benefits that previously vested in a tribe, group, family or individuals in respect

77 Trust Lands Act (Cap 288) s 5 states: 'There shall be established in respect of each division created under this Part a Divisional Land Board, which shall consist of— (a) a chairman, appointed by the Minister for the time being responsible for land after consultation with the council; (b) not less than four and not more than fifteen persons appointed by the council; (c) not more than two public officers appointed by the council; and (d) two persons appointed by the council from amongst its members: Provided that, where a Divisional Board established under the Kenya (Land Control) (Transitional Provisions) Regulations, 1963, has jurisdiction over any division created under this Part, that Board shall be the Divisional Land Board for that division for the purposes of this Act.'

78 Trust Lands Act s 53 states: 'The Commissioner of Lands shall administer the Trust land of each council as agent for the council, and for that purpose may— (a) exercise on behalf of the council, personally or by a public officer, any of the powers conferred by this Act on the council, other than that conferred by section 13 (2) (d) of this Act; and (b) execute on behalf of the council such grants, leases, licences and other documents relating to its Trust land as may be necessary or expedient: Provided that— (i) the Commissioner of Lands shall act in compliance with such general or special directions as the council may give him; and (ii) the Minister may, by notice in the Gazette, terminate the Commissioner of Land's power to act under this section in relation to the Trust land of any particular council, where the Minister is satisfied that the council has made satisfactory arrangements to administer its Trust land itself.'

of the land.⁷⁹ However, such tribe, group, family or individuals that had vested rights or interest in land set apart are entitled to prompt payment of full compensation from the Government before the land can legitimately be set apart.⁸⁰ The procedure for setting trust land apart at the instance of the county council is set out under section 13(2) of the Trust Land Act (Cap 288) Laws of Kenya, to wit:

- (a) The council notifies the chairman of the relevant land divisional board of the proposal to set apart the land.
- (b) The board meets at an appointed date between one to three months from the date of receipt of the notification, to consider the proposal by the council.
- (c) The council notifies the local inhabitants of the relevant land division of the proposal to set apart the land and the appointed date and time of the meeting of the relative land divisional board.
- (d) The land divisional board hears and records in writing the representations of the local inhabitants of the relative land division, and submits to the council its recommendations in regard to the representations of the local inhabitants.
- (e) The council is obliged to take into account the recommendations of the divisional board in making its resolution.
- (f) Where the divisional board recommends that the trust land be set apart, the proposal to set apart the trust land will only be deemed to have been passed, if the proposal is passed by majority of members of the council.

79 Constitution of Kenya art 117(2) states: 'Where a county council has set apart an area of land in pursuance of this section, any rights, interests or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law shall be extinguished.'

80 Constitution of Kenya art 117(4) states: 'No setting apart in pursuance of this section shall have effect unless provision is made by the law under which the setting apart takes place for the prompt payment of full compensation to any resident of the land set apart who—

- (a) under the African customary law for the time being in force and applicable to the land, has a right to occupy any part of the land; or
- (b) is, otherwise than in common with all other residents of the land, in some other way prejudicially affected by the setting apart.' Setting apart of Trust Land has similar effect as compulsory acquisition of land under the Land Acquisition Act (Cap 285) Laws of Kenya.'

- (g) Where the divisional board does not recommend that the trust land be set apart, the proposal to set apart the trust land will only be deemed to have been passed, if the proposal is passed by two thirds of members of the council.
- (h) A resolution to set apart trust land must be gazetted by the council for it to take effect.
- (i) Any tribe, group, family or individuals that had vested rights or interest in land set apart can apply to the District Commissioner for prompt payment of full compensation. The District Commissioner consults with the relative divisional board to determine whether the claim for compensation is justified. The Minister for Lands deposits with the District Commissioner funds sufficient to compensate all the genuine applicants.
- (j) An appeal by either the applicant for compensation or the Commissioner of Lands lies from the decision of the District Commissioner to the Provincial Agricultural Board and to the High Court.

Setting apart can also be at the instance of the President through a Presidential Notice. Pursuant to Article 118(1) of the Constitution of Kenya, the President may, after consultation with the council, give a written notice that land within the county council be set apart for specified and permitted purposes. The purposes for which land may be set apart at the instance of the President are for purposes of use by the Government of Kenya, use by a body corporate established for public purposes by an Act of Parliament, use by a company in which shares are held by or on behalf of the Government of Kenya, or for purposes of prospecting or extraction of minerals.⁸¹ In either case, a tribe, group, family or individuals that had vested rights or interest in land set apart are entitled to prompt payment of full compensation from the Government before the land can legitimately be set apart. The procedure for setting trust land apart at the instance of the Government is that:

- i) The Government notifies the council of the land it seeks to be set apart.

81 Constitution of Kenya (Repealed) s 118(2).

- ii) The Government then demarcates the boundaries of the land to be set apart.
- iii) The Government then clears any boundary or other line which may be necessary to be cleared for purposes of demarcating the land.
- iv) The council then publishes the notice to set apart the land in the Gazette.
- v) Any tribe, group, family or individuals with vested rights or interest in land set apart can apply to the District Commissioner for prompt payment of full compensation. The District Commissioner consults with the relative divisional board to determine whether the claim for compensation is justified. The Minister for Lands deposits with the District Commissioner funds sufficient to compensate all the genuine applicants.
- vi) An appeal by either the Applicant or the Commissioner of Lands lies from the decision of the District Commissioner to the Provincial Agricultural Board and to the High Court.

The authors have deliberately placed a lot of emphasis on the administration of Trust Lands because it was one of the hubs for land grabbing under the repealed Constitutional order.⁸² Conscious of this reality, the New Constitution introduced institutional reforms, which we shall discuss shortly, geared towards sanitising management of, *inter alia*, Trust Lands.

2.2.3 CUSTOMARY TENURE

Customary tenure hinges on a number of principles. Rights of access and use of land is determined by membership to the social unit of production and or political community.⁸³ Rights of control vest in the political authority of the unit or community. Control of the tenure is for purpose of guaranteeing access to the land and is redistributive spatially and inter-generationally. No beneficiaries of the tenure have greater rights of access and use than the present cultivators. The rights over the land are transmitted. Lastly, shared

82 See, for instance, 'Report of the Interim Coordinating Secretariat, Mau Forests Complex' (n 9 above).

83 Ogolla & Mugabe (n 68 above) 97.

resources which require harnessing such as pastoral lands, water are managed by the relevant political entity.

Noteworthy is that beginning 1968, arid and semi-arid parts of the country where dominant land use was pastoralism were managed through Land (Group Representatives) Act.⁸⁴ In this regime, communal land is divided into smaller units called ranches which are then registered in the names of between three to ten representatives elected by the members of the respective ranch. Every member of the ranch has a right of ownership of the ranch in its undivided share. Since 1990 system of landholding in the ranches has been transiting, with the possibility of dividing the ranches and issuing titles thereto to the individual members.

2.2.4 PRIVATE TENURE

Private land is land lawfully held, managed and used by an individual or other entity under statutory tenure. It derives from the Government Land Act,⁸⁵ Registration of Titles Act,⁸⁶ Land Titles Act,⁸⁷ Registered Land Act,⁸⁸ Trust Land Act,⁸⁹ the Indian Transfer of Property Act⁹⁰ and the Sectional Properties Act.⁹¹ Private tenure emphasises indefeasibility of title except in cases of fraud to which the proprietor is a party.

3 ENVIRONMENTAL REGULATION IN KENYA

Environmental management in Kenya prior to 1999 was done exclusively by use of sectoral laws contained in about 77 statutes. In 1999, the Environmental Management and Coordination Act (EMCA) was enacted in a bid to coordinate the sectoral laws on environment. EMCA establishes a number of institutions mandated to perform distinct functions in environmental regulation.

84 Land (Group Representatives) Act (Cap 287) Laws of Kenya.

85 Cap 280, Laws of Kenya

86 Cap 281, Laws of Kenya.

87 Cap 282, Laws of Kenya

88 Cap 300, Laws of Kenya.

89 Cap 288, Laws of Kenya

90 1882 as amended.

91 No. 21 of 1987.

The highest policy making organ under EMCA is the National Environmental Council⁹² which formulates and enforces policy standards for the protection of the environment.⁹³ The principal instrument of Government for implementation of environmental policies is the National Environmental and Management Authority (NEMA). NEMA supervises and co-ordinates matters that relate to the environment.⁹⁴ Within provinces and district,s the EMCA authorises the Minister for Environment to appoint Provincial and District Committees chaired by the respective Provincial and District Commissioners, with the mandate of discussing and making decisions on matters that relate to proper management of the environment within the province or district.⁹⁵ EMCA also establishes specialised committees such as the Technical Advisory Committee which advises NEMA on Environmental Impact Assessment Reports;⁹⁶ National Environmental Action Plan Committee mandated to develop 5-year national environmental

92 Environmental Management and Co-ordination Act No. 8 of 1999 s 4 states: '(1) There is established a council to be known as the National Environment Council (hereinafter referred to as the "Council") which shall consist of—(a) the Minister who shall be the chairman; (b) the Permanent Secretaries in the Ministries for the time being responsible for the matters specified in the First Schedule; (c) two representatives of public universities in Kenya to be appointed by the Minister; (d) two representatives of specialised research institutions in Kenya to be appointed by the Minister; (e) three representatives of the business community, to be appointed by the Minister, one of whom shall be a representative of oil marketing companies; (f) two representatives of Non-Governmental Organisations active in the environmental field to be appointed by the Minister; (g) the Director-General who shall be the secretary; and (h) such number of other members as may, from time, be co-opted by the Minister to be members of the Council.'

93 As above. S 5 states: '(a) The Council shall— (a) be responsible for policy formulation and directions for purposes of this Act; (b) set national goals and objectives and determine policies and priorities for the protection of the environment; (c) promote co-operation among public departments, local authorities, private sector, Non-Governmental Organisations and such other organisations engaged in environmental protection programmes; and (d) perform such other functions as are assigned under this Act.'

94 As above. S 9 states: '(1) The object and purpose for which the Authority is established is to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment.'

95 See s 29.

96 S 61 states: 'The Authority may set up a technical advisory committee to advise it on environmental impact assessment related reports and the Director-General shall prescribe the terms of reference and rules of procedure for the technical advisory committee appointed hereunder'.

action plans for consideration and adoption by Parliament;⁹⁷ and the Standards and Enforcement Review Committee which advises on water quality and standards and procedure for discharging effluents into the environment.⁹⁸

EMCA has two disputes resolution bodies- the Public Complaints Committee (PCC) and the National Environmental Tribunal (NET). PCC is charged with the mandate of investigating allegations of complaints against any person or NEMA in relation to allegations of environmental degradation.⁹⁹ NET hears appeals from decisions of the Director General, NEMA and/or Committees of NEMA.¹⁰⁰ The core principle governing environmental protection in Kenya is the principle of sustainable development which is facilitated by the codified public interest litigation in section 3(4) of EMCA.¹⁰¹

4 OUTLINE OF CHAPTER FIVE OF THE NEW CONSTITUTION

The people of Kenya, collectively as a nation, community and individuals own all land in Kenya.¹⁰² The land is held, used and managed in a manner that guarantees equitable access rights, security of land rights, sustainability of land resources, transparent and cost effective land

97 EMCA second schedule.

98 EMCA s 70 as read together with the Third Schedule.

99 As above s 31-36

100 S 129 states: '(1) Any person who is aggrieved by:— (a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder; (b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder; (c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder; (d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder; (e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder; may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.'

101 EMCA s 3(4) states: 'A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action— (a) is not frivolous or vexatious; or (b) is not an abuse of the court process.' Contrast this with earlier decisions such as *Wangari Maathai vs The Kenya Times Media Trust* [1989] KLR 267 & *Maathai and 2 others v. City Council of Nairobi and 2 others*, Civil Case No. 72 of 1994, where the Courts held that Professor Wangari Maathai had no locus to bring a claim for environmental protection where she suffered no personal injury.

102 The Constitution of Kenya art 61(1).

administration, conservation and protection of ecological resources, gender balance in land holding and use, and in a manner that promotes local community initiatives in resolution of land disputes.¹⁰³ The three main tenure systems include public, community and private tenure.¹⁰⁴

Public tenure includes un-alienated government land as at the effective date; land held, used or occupied by any State organ other than private leases; land sold, reverted or surrendered to the State; land in respect of which neither individual nor communal ownership can be legally established; and land in respect of which no heir can be legally identified. Whereas the foregoing categories of land are administered by the National Land Commission, such lands vest in and are held by county government in trust for the people resident in the respective county.¹⁰⁵

Minerals and mineral oils; forests other than those falling in community lands; reserves, water catchment areas, national parks, government animal sanctuaries and specially protected areas; roads and thoroughfares; water bodies; territorial sea, exclusive economic zone, the seabed, continental shelf, land between the high and low water marks; and land classified as public land by dint of a statute are other categories of public land.¹⁰⁶ Such lands vest in and are held by the national government in trust for the people of Kenya and administered on behalf of the Kenyan people by the National Land Commission.¹⁰⁷ Public land can only be effectively disposed under a statute.¹⁰⁸

Community land vests in and is held by communities on the basis of ethnicity, culture and similar interests. It comprises land registered in the name of group representatives; land legally transferred to a specific community; land held, managed or used by specific communities as forests, grazing areas or shrines; land traditionally occupied by hunter-gatherer communities; trust land held by county governments other than public land; and land statutorily declared as community land.¹⁰⁹ Unregistered community land is held in trust

103 As above art 60(1).

104 As above art 61(2).

105 As above art 62(1) & (2).

106 As above art 62(1).

107 As above art 62(3).

108 As above art 62(4).

109 As above art 63(1) & (2).

by county government on behalf of communities for which it is held.¹¹⁰ Just like public land, community land can only be effectively disposed under a statute. Private land comprises registered land held by any person under freehold tenure, leasehold tenure, or by dint of a statute.¹¹¹

Non-citizens may hold land only on the basis of leasehold tenure for a maximum period of 99 years. Any conveyance purporting to confer leasehold interest for a period greater than 99 years is deemed to confer 99 year leasehold interest.¹¹² For purposes of landholding by corporations, a corporation is deemed to be a citizen only if it is wholly owned by one or more citizens and the beneficial interest in property held in trust by the corporation is for citizens.¹¹³

The Constitution establishes the National Land Commission as the body mandated to manage public land on behalf of the national and county governments; recommend national land policy to the national government; initiate land titling programmes; research on land use and use of natural resources; investigate and recommend mechanisms for redress of historical land injustices; encourage use of traditional disputes resolution mechanisms in land conflicts; assess tax on land and premiums on immovable property; and to perform oversight roles over land use planning.¹¹⁴ The National Land Commission would be created through a National Land Commission Act. The Commission would perform all the roles currently specified in Sessional Paper No 3 of 2009. The Commission would assume the technical functions of the Ministry of Lands. The statute creating the Commission would provide a clear transitional mechanism in managing land before the Commission is fully operational. Besides the Commission, there is need to consolidate land administration through the enactment of a Land Act. This would necessarily lead to the repeal of all the statutes that variously respond to the question of land administration. This would be undertaken within the timeframes set out in Schedule Five of the Constitution.

The state is mandated to ensure sustainable exploitation, use, management and conservation of the environment and natural

110 As above art 63(3).

111 As above art 64.

112 As above art 65(1) & (2).

113 As above art 65(3).

114 As above art 67(2).

resources, and to eliminate activities that are likely to endanger the environment.¹¹⁵ Everyone has a duty to co-operate with state organs and other persons to protect and conserve the environment.¹¹⁶ Article 70 of the Constitution codifies public interest litigation by mandating anyone who alleges infringement of environmental right to approach court for redress. Parliament has to sanction any agreement for exploitation or concession of natural resources before such agreement can have validity.¹¹⁷

In order to operationalise the spirit and purport of the Constitution, Parliament is mandated to revise, consolidate and rationalise existing land laws; revise sectoral land laws to accord with the principles of land policy; legislate on minimum and maximum land holding acreages in respect of private land, the process for conversion of land from one category to another, recognition and protection of matrimonial property, protection, conservation and access to public land, review of propriety or legality of grants or dispositions of public land, and protection of interest of dependants in a deceased estate¹¹⁸ and to operationalise constitutional provision on the environment.¹¹⁹ Under the Fifth Schedule, legislation on exploration and concessioning of natural resources is to be enacted within five years. Legislation regarding environment is enacted within four years.

5 IMPROVEMENT ON LAND AND ENVIRONMENTAL GOVERNANCE UNDER THE NEW CONSTITUTION

5.1 IN RESPECT OF ABUSE OF PRESIDENTIAL DISCRETION IN LAND ALLOCATIONS

As a bulwark against abuse of presidential discretion in allocation of public land,¹²⁰ Article 62(4) of the Constitution succinctly provides that ‘public land shall not be disposed of’ except in terms of a statute that specifies ‘the nature and terms’ of the disposal and use. The effect of the provision is to introduce a system of check and

115 As above art 69(1).

116 As above art 69(2).

117 As above art 71(1).

118 As above art 68.

119 As above art 72.

120 Ndungu Report (n 3 above) 148-169.

accountability in exercise of the presidential discretion. In Article 67(2)(a) of the Constitution, management of the public land is vested in a Commission—the National Land Commission—not an individual. This increases the latitude for consultation before dealing in public land.

5.2 IN RESPECT OF USE OF CORPORATIONS AS CONDUITS FOR LAND GRABBING

Whereas land grabbers have in the past hidden behind corporations, including foreign corporations, to fleece the public of its land,¹²¹ Article 65(3) of the Constitution insists on not only disclosure of ownership of corporations but also disclosure of beneficial interests therefrom for purposes of categorising the corporations as citizens or non-citizens in relation to property ownership. This promotes transparency in land ownership by corporations. Community land ‘shall not be disposed of’ except in terms of a statute that specifies ‘the extent of rights of the members of each community individually and collectively.’ This promotes accountability in dealing with Community land. Whereas the National Land Commission administers Community land on behalf of county governments,¹²² such administration is for the benefit in whose trust the title to Community land vests in the county government.

5.3 IN RESPECT OF IRREGULAR DISPOSAL OF TRUST LANDS AND GROUP LANDS

Just like it was observed by the late Justice Madan in *Kariuki v. Kariuki*¹²³ that it is not the intention of Parliament to destroy customary land trust of large sections of the peoples of Kenya in favour of individual tenure, Article 63 of the Constitution identifies Community land and vests its ownership on County government who hold the community land in trust of people resident in the County.

121 As above 89-90.

122 Constitution of Kenya art 67(2)(a).

123 *Kariuki v Kariuki* (n 14 above).

5.4 IN RESPECT OF CONSERVATION OF FORESTS, NATIONAL PARKS, GAME RESERVES, RIPARIAN RESERVES AND SPECIALLY PROTECTED AREAS

Plunder of forests, national parks, game reserves, riparian reserves and other environmental resources¹²⁴ is curbed under the Constitution. The Constitution identifies such resources as public land whose title either vests in respective county government or national government, administered by the National Land Commission, and whose disposition, if at all, can only be legal if it accords with statute that specifies ‘the nature and terms’ of the disposal and use.¹²⁵

5.5 IN RESPECT OF PASTORAL LANDS

Past instances where pastoral lands were allocated to private individuals¹²⁶ are checked under the Constitution. Pastoral land and land held by hunter gatherer community is recognised under Article 63(2)(d) of the Constitution as a Community land, whose disposal, if at all, must accord to the terms of a statute that specifies ‘the extent of rights of the members of each community individually and collectively.’

5.6 IN RESPECT OF SQUATTER PROBLEMS AT THE COAST

The squatters among the Mijikenda community who for generations have been denied land rights at the coast¹²⁷ now have their land question addressed under Article 63(2) of the Constitution which defines Community land to include ancestral land. Furthermore, limitation of landholding by non-citizens under Article 65 of the Constitution to 99 years is critical in reducing the near infinite 999 years leasehold interests by non-citizens to some determinable period.

124 Ndungu Report (n 3 above) 148-169.

125 Art 62(4).

126 Lenaola (n 16 above).

127 Kanyinga (n 21 above).

5.7 IN RESPECT OF HISTORICAL INJUSTICES IN LAND

One of the mandates of the National Commission includes investigating and recommending mechanisms for redressing historical land injustices. The mandates are critical as a reprieve to persons whose land are irregularly or illegally acquired.

5.8 IN RESPECT OF GENDER PARITY IN LAND USE, HOLDING AND ACCESS

Equitable access to land is codified as one of the principles of land policy.¹²⁸ Women who have for generations been discriminated against in land ownership, access and use have a sense of reprieve under the Constitution. Moreover, Article 68 obliges Parliament to enact legislation that recognises and protects matrimonial property and protection of interest of dependants in a deceased estate.

5.9 SELF ENFORCEMENT OF THE CONSTITUTION

The Fifth Schedule of the Proposed Constitution obliges Parliament to enact statutes to operationalise community land and regulate state power to manage land use and property within five years from the effective date, while 18 months from effective date, Parliament is obliged to enact legislation that consolidate and rationalise existing land laws; revise sectoral land laws to accord with the principles of land policy; prescribe minimum and maximum land holding acreages in respect of private land, the process for conversion of land from one category to another, recognition and protection of matrimonial property, protection, conservation and access to public land, review of propriety or legality of grants or dispositions of public land, and protection of interest of dependants in a deceased estate.¹²⁹ In the event that Parliament fails to adhere to the timeline, Article 261 (5) – (9) states as follows:

(5) If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter.

(6) The High Court in determining a petition under clause (5) may–

¹²⁸ Constitution of Kenya art 60(1) (a).

¹²⁹ As above Fifth Schedule as read together with art 261(1), (2) & (3).

- a) make a declaratory order on the matter; and
 - b) transmit an order directing Parliament and the Attorney General to take steps to ensure that the required legislation is enacted within the period specified in the order, and to report progress to the Chief Justice.
- 7) If Parliament fails to enact legislation in accordance with an order under clause 6(b), the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament.
- 8) If Parliament has been dissolved, the new Parliament shall enact the required legislation within the specified periods in the Fifth Schedule beginning with the date of commencement of the new Parliament.
- 9) If the new Parliament fails to enact legislation in accordance with clause (8), the provisions of clauses (1) to (8) shall apply afresh.¹³⁰

The import of the foregoing provision is that at the order of Court, Parliament will be obliged to legislate in terms of the Court Order, failure to which adverse consequences being dissolution of Parliament will be in the offing. Any person may petition the High Court to make a declaratory order on the petition and transmit an order directing Parliament and the Attorney General to enact the statute within the timelines specified in the order. The self enforcing provisions in the Constitution guarantee that Parliament neither selectively debates bills nor does it use bills as baits for self aggrandisement as it has occurred in the past where Parliament held the Executive at ransom until the Executive conceded to the Parliamentarians pay hikes.¹³¹

6 CONCLUSION

The constitutional provisions on environmental and land use, management and access are an improvement over the repealed Constitution. The Constitution has safeguards that protect against abuse of presidential discretion in land allocations; conservation of

¹³⁰ As above arts 261(5), (6), (7), (8) & (9).

¹³¹ A Kagiri 'Kenyan President fails to strike deal with MPs' 22 July 2010 available at <http://www.capitalfm.co.ke/news/Kenyanews/Kenyan-President-fails-to-strike-deal-with-MPs-9176.html>, (accessed on 31 October 2010). According to the author, the government had to assure the Members of Parliament that their salaries would not be taxed till after 2012 before the Members of Parliament could assure the government of their support for the New Constitution.

environmental resources, addressing historical injustices, protecting group lands including ancestral lands, solving squatter problems and achieving gender parity in landholding. The constitutional provisions will however bring with it institutional reforms in terms of management and use of land and the environment.

CHAPTER SIX

SEPARATION OF POWERS

ELISHA Z. ONGOYA*

A useful model of the analysis of any Constitution, therefore, is to regard it as a 'power map' upon which framers may delineate a whole set of concerns...¹

1 INTRODUCTION

In a very enlightening piece, Mutakha Kangu adverts to the argument that there exists a fundamental nexus or a fundamental nexus necessarily ought to exist between constitutional theory and constitutional architecture and design. He argues that the failure by orthodox constitutional scholarship and Constitution-making to clearly and effectively recognise, understand and emphasise the said nexus has contributed to shortcomings in the contemporary Constitution-making experiences. Such failure ends up producing Constitutions without constitutionalism.²

The objective of this chapter is to examine and interrogate the extent to which the architects and designers and their consequential architecture and design of the Constitution of Kenya 2010 paid homage to the fundamental doctrine of constitutional theory known as separation of powers. Every Constitution in virtually every state is invariably designed to organise government to perform certain functions in order to serve the purpose of the state. In terms of its promise, every Constitution anticipates the performance of the functions of a state in a manner that achieves the public good.

* LLM (Nairobi); LLB (Nairobi); Dip. Law, Kenya School of Law. Ongoya is an Advocate of the High Court of Kenya practising in the firm of Asiema & Co Advocates; and a Lecturer in Civil Litigation (Kenya School of Law) and Constitutional Law (Kabarak University).

1 H W O Okoth-Ogendo 'Constitutions without constitutionalism: Reflections on an African political paradox' in I G Shivji (ed.) *State and constitutionalism: An African debate on democracy* (1991) 5.

2 J M Kangu 'Constitutionalism: A comparative analysis of Kenya and South Africa' *Moi University Law Journal* (2008) 2/1 105.

The functions of government have traditionally been broadly categorised as legislative (law making), executive (law application/administration) and judicial (adjudication in accordance with the law). This separation of the functions of the state into the organs that discharge them is what has, over centuries of scholarly debate, thinking and application, come to be known as separation of powers.

The most enduring exposition of the meaning and rationale for the doctrine of separation of powers as an essential constitutional principle, and essential pre-requisite to constitutionalism, is the one associated with Baron De Montesquieu—the celebrated French scholar and philosopher. According to Montesquieu:

Constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority until he is confronted with limits ... When the legislative and executive powers are united in the same person, or in the same body of Magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, and execute them in a tyrannical manner. Again there is no liberty if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control for the judge would be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end to everything were the same man or the same body to exercise those three powers, that of enacting laws, that of executing the public resolutions and of trying cases of individuals.³

Before Montesquieu, John Locke had written in his treatise *Civil Government* about the three powers that existed in every ‘commonwealth’, which were the legislative, the executive⁴ and the federative.⁵ The executive and the federative powers, according to John Locke were ‘always almost united’. Locke disapproved of the union of the legislative and executive for the reason that the

3 F Neumann *Spirit of the Laws* (6 ed.) (1949) 151 – 152.

4 It has been argued that what Locke referred to as Executive power is the present day Judicial Power as renamed by Montesquieu since the executive function as described by Locke had been to execute the laws in any case.

5 According to Locke, the federative powers related to the conduct of foreign affairs. What Locke described as the federative power is what eventually came to be known in Montesquieu’s words Executive Power.

legislative power ‘in well ordered commonwealth where the good of the whole is so considered as it ought’ is placed in the hands of an assembly that convenes at intervals. On the other hand since the administration and enforcement of the law is a continuous task a power distinct from the legislative had to remain ‘always in being’. The second justification that Locke proffered for the separation of the legislative and executive power of the state was that ‘it may be too much temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them.’⁶

The polemics around the extent of separation of powers as suggested by Montesquieu seems to have been well answered by the interpretation of Herman Finer when he wrote ‘Montesquieu was searching for means to limit the Crown; to make a Constitution; to build canals through which, but not over which power should stream; to create intermediary bodies; to check and balance probable despotism and yet he did not wish to fly to the extreme of democracy.’⁷ There cannot be any isolation or disharmony between the different departments of government. Isolation is not the essence of the doctrine of separation of powers and Montesquieu never suggested it. Each department performs some functions which actually do not belong to it. In fact, in all modern systems, institutions exercise overlapping functions of some kind or provision is made for some degree of cooperation between the different organs and branches to perform the work of government.⁸ One of the most readily available justifications for the overlap in the exercise of state power is the need to secure checks and balances so that every organ is checked by the other or others in the manner in which it carries itself out.

Montesquieu’s theory of separation of power as a foundation of constitutional ordering of states sought to group the activities of government into three divisions; the legislative division, the

6 J Locke *Second Treatise of Civil Government* Chapter 12 sections 143-148; other writings that have appreciated the doctrine of separation of powers are those by W Blackstone *Commentaries on the laws of England* (1765-1769); J Madison *Federalist Paper Number 47* (1788).

7 H Finer *The theory and practice of modern government* (1949) 277.

8 A C Chand *Principles of Political Science* (1950) 478.

administrative division and the division to judge. By assigning each of these functions to different branches of government composed of separate personnel and following their own mode of action, separation was thought to obtain. Subsequent thinking has sought to consider independent constitutional commissions and offices that are created to operate independent of the conventional executive as we know it as a fourth arm of government. Such independent commissions are thought to be the fourth arm of government with powers to independently check the exercise of power by the other arms of government while their exercise of power is subject to checks in a manner prescribed by the Constitution— power halts power (*le pouvoir arrete le pouvoir*). In meeting its objective, this chapter will address two fundamental questions: What powers are created and where are they vested under the Constitution of Kenya 2010? To what extent does the Constitution of Kenya 2010 create a fusion or overlap of power?

2 THE RECOGNITION AND VESTING OF EXERCISE OF POWERS BY THE CONSTITUTION OF KENYA 2010

2.1 SOVEREIGN POWER

The Constitution of Kenya recognises one omnibus and superimposing power known as sovereign power which it recognises as belonging to the people of Kenya. The Constitution does not define this power, however, by necessary construction this power should be the sum total of the power donated for its exercise by the organs of the state as highlighted below together with the residual power retained by the people of Kenya to be exercised directly. After recognition of the sovereign authority of the people of Kenya, the Constitution proceeds to ‘compartmentalise’ part of the said power in terms of the organs to which the said power is delegated with a rider that such exercise of power should be ‘in accordance with this Constitution.’ The identified organs are Parliament and legislative assemblies in the county governments; the national executive and the executive structures in the county governments, and, the judiciary and independent tribunals.⁹

⁹ Art 1(3) of the Constitution of Kenya 2010.

2.2 SEPARATION OF POWER BETWEEN THAT OF THE NATIONAL LEVEL GOVERNMENT AND THE COUNTY LEVEL GOVERNMENT

Another formula used to separate the power derived from the people of Kenya is in respect of the levels of government that exercise specifically prescribed power, namely; the national level and the county level.¹⁰ It is discernible from the Constitution that, save for judicial power that is singularly retained by the national level of government, legislative and executive powers of government are shared between the national and county levels of government. There is a sense of separation of power not just between organs of government but also between levels of government. Indeed, the Constitution isolates functions and powers into those of the national and the county government with two riders, namely, functions and powers within the concurrent jurisdiction of the levels of government and functions and powers over which the Constitution is silent in terms of the competent level of government to exercise in which case the power and function becomes that of the national government.¹¹ The precise functions exercisable by each tier of government are set out in the Fourth Schedule to the Constitution.

The table below sets out the functions of the National Government and the County Government as spelt out in the Fourth Schedule of the Constitution.

Functions of the National Government	Functions of the County Government
Foreign affairs, foreign policy and international trade.	Agriculture, including: Crop and animal husbandry Livestock sale yards County abattoirs Plant and animal disease control, and Fisheries

¹⁰ As above art 1(4).

¹¹ As above arts 186 & 187 as read with the Fourth Schedule.

The use of international waters and water resources	County health services, including in particular: County health facilities and pharmacies Ambulance services Promotion of primary health care Licencing and control of undertakings that sell food to the public Veterinary services (excluding regulation of the profession) Cemeteries, funeral parlours and crematoria, and Refuse removal, refuse dumps and solid waste disposal
Immigration and Citizenship	Control of air pollution, noise pollution, other public nuisances and outdoor advertising
The relationship between religion and state	Cultural activities, public entertainment and public amenities including: Betting, casinos and other forms of gambling Racing Liquor licencing Cinemas Video shows and hiring Libraries Museums Sports and cultural activities and facilities, and County parks, beaches and recreation facilities

Language policy and the promotion of official and local languages	County transport, including: County roads Street lighting Traffic and parking Public road transport, and Ferries and harbour, excluding the regulation of international and national shipping and matters related thereto
National defence and the use of the national defence service	Animal control and welfare, including: Licencing of dogs Facilities for the accommodation, care and burial of animals
Police services, including: The setting of standards of recruitment, training of police and use of police services Criminal law, and Correctional services	Trade development and regulation, including: Markets Trade licences (excluding regulation of professions) Fair trading practices Local tourism Co-operative societies
Courts	County planning and development, including: Statistics Land survey and mapping Boundaries and fencing Housing, and Electricity and gas reticulation and energy regulation
National economic policy and planning	Pre-primary education, village polytechnics, homecraft centres and childcare facilities

Monetary policy, currency, banking (including central banking), the incorporation and regulation of banking, insurance and financial corporations	Implementation of specific national government policies on natural resources and environmental conservation, including: Soil and water conservation, and Forestry
National statistics and data on population, the economy and society generally	County public works and services, including: Storm water management systems in built up areas, and Water and sanitation services
Intellectual property rights	Fire fighting services and disaster management
Labour standards	Control of drugs and pornography
Consumer protection, including standards for social security and professional pension plans	Ensuring and co-ordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.
Education policy, standards, curricula, examinations and the granting of university charters	
Universities, tertiary education institutions and other institutions of research and higher learning and primary schools, special education, secondary schools and special education institutions	
Promotion of sports and sports education	

Transport and communications, including in particular: Road traffic The construction and operation of national trunk roads Standards for the construction and maintenance of other roads by counties Railways Pipelines Marine navigation Civil aviation Space travel Postal services Telecommunications, and Radio and television broadcasting	
National public works	
Housing policy	
General principles of land planning and the co-ordination of planning by the counties	
Protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular: Fishing, hunting and gathering Protection of animals and wildlife Water protection, securing sufficient residual water, hydraulic engineering and the safety of dams, and Energy policy	

National referral health services	
Disaster management	
Ancient and historical monuments of national importance	
National elections	
Health policy	
Agricultural policy	
Veterinary policy	
Energy policy including electricity and gas reticulation and energy regulation	
Capacity building and technical assistance to the counties	
Public investment	
National betting, casinos and other forms of gambling	
Tourism policy and development	

2.3 ORGANS OF GOVERNMENT AND THEIR RESPECTIVE POWERS

In its introductory articles, the Constitution seems to recognise the organs of the state as the three traditional organs, the executive, the legislative and the judicial. In its body, however, it establishes and vests exercise of power in ‘Commissions and Independent Offices’¹² which are, among other things, ‘to secure the observance by all state organs of democratic values and principles’¹³ and ‘independent and not subject to direction or control by any person or authority.’¹⁴ With the above powers and independence, there is sufficient justification in the argument that these Commissions and Independent offices constitute a fourth arm of the state. Each of the Commissions and Independent Offices established by or under the Constitution has specific functions and powers assigned to it in addition to the general

12 See Chapter 15 of the Constitution of Kenya 2010.

13 As above art 249(1)(b).

14 As above art 249(2)(b).

powers, and objectives of all the commissions and independent offices set out in Chapter 15 of the Constitution.¹⁵ The traditional organs of government are vested with the exercise of the powers discussed below, derivable from the people of Kenya.

2.3.1 LEGISLATIVE POWER

This authority is, at the national level, vested in and exercisable by parliament.¹⁶ At the county level, it is vested in and exercisable by the county assemblies.¹⁷ This express vesting of legislative authority in the specified institutions, subject to express delegation, is fundamental to avoid usurpation of authority. Prior to the Constitution of Kenya 2010, the power to ratify treaties in Kenya has been exercised by the national executive without any express constitutional foundation. It is arguable that the executive exercised such power on the understanding that it had the 'residue of the functions of government after legislative and judicial functions have been taken away.'¹⁸

In the new constitutional order it is expressly recognised that any treaty or convention ratified by Kenya forms part of the law of Kenya.¹⁹ If the above provision is seen with the dictate that no person or body, other than parliament, has the power to make provision having the force of law in Kenya except under authority conferred by the Constitution or by legislation,²⁰ and there being no provision in the Constitution vesting the power to ratify treaties in the executive, one is left with no recourse but to conclude that parliament now has an active role to debate and approve any treaty

15 The Constitution at art 79 envisages the establishment of the Ethics and Anti-Corruption Commission through legislation. It also envisages legislation restructuring the already established Kenya National Human Rights and Equality Commission into two or more separate commissions at art 59(4)&(5).

16 See art 94(1) as read with art 1(3)(a) of the Constitution of Kenya 2010. The term Parliament in the Constitution means the National Assembly and the Senate.

17 Art 185(1) as read with art 1(3)(a).

18 See JB Ojwang *Constitutional development in Kenya: Institutional adaptation and social change* (1990) 75.

19 Art 2(6) of the Constitution of Kenya 2010.

20 As above art 94(5).

before it is ratified in Kenya. This is, of course, subject to parliament making legislation delegating that authority.²¹

2.3.2 EXECUTIVE POWER

Like all other power under the Constitution, the executive power is originally reposed in the people of Kenya and delegated for purposes of its exercise. The National Executive authority in the Republic of Kenya is vested in a collegiate collectivity of the President, the Deputy President and the rest of cabinet, under the leadership of the President.²² This is a departure from the old order when the executive authority was singularly vested in the President. At the county level, the executive authority is vested in and exercised by yet another collegiate body, a county executive committee under the leadership of the county governor.²³ In terms of the distinction between the 'efficient' and 'dignified' functions of the national executive,²⁴ it is discernible that whereas the 'efficient function is vested in the collegiate body under the leadership of the president and, in a multiplicity of occasions, with the approval of the National Assembly, the dignified function is vested in the president who is the head of state.'²⁵ The precise functions to be performed by the respective national and county executives are spelt out at the Fourth Schedule to the Constitution.

21 The power to delegate is itself highly limited by art 94(6) that requires any legislation delegating law making authority to expressly specify the purpose or objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.

22 Art 130(1) as read with art 1(3)(b) of the Constitution of Kenya 2010.

23 As above art 179(1).

24 The 'efficient' function is the daily conduct of government whereas the 'dignified' function comprises of the symbolic and ceremonial aspects of state leadership. This categorisation is derived from the works of W Bahegot *The English Constitution* (1963) as cited with approval in Ojwang (n 18 above).

25 The dignified functions of the state to be performed by the president include; addressing the opening of each newly elected parliament, addressing a special sitting of parliament once every year and any other time, making an address to the nation once every year on the progress achieved in the realisation of national values, receiving foreign diplomatic and consular representatives, conferring honours in the name of the people and the Republic and exercise of the power of mercy.

2.3.3 JUDICIAL POWER

The judicial function is a preserve of the national government under the Constitution of Kenya 2010.²⁶ The Constitution expressly vests the exercise of judicial power in courts and tribunals ‘established by or under the Constitution.’²⁷ This is a departure and, arguably, a major improvement from the old order when there was no express vesting of judicial power in the institutions that constitute the judiciary. In the case of the previous order it ‘left open the possibility of the Legislature asserting itself by giving a judgment in a specific case. In that case it would be possible for the Legislature to pass a bill of attainder, legislation which appears as judgment condemning a particular individual, say, of treason and meting out a desired punishment.’²⁸ The possibility of this undesirable eventuality of fusion of judicial and legislative power is eliminated by the express provisions in respect of the vesting and exercise of judicial power by the Constitution of Kenya 2010.

The Constitution then proceeds to set up a system of courts, prescribe the jurisdiction or prescribe the manner in which jurisdiction has to be vested in the courts anticipated to be established. The power of the judiciary is itself highly guided through the setting out the guiding principles of exercise of judicial power²⁹ and principles of judicial independence.³⁰ In addition to vesting of judicial power in the judiciary, the Constitution establishes judicial offices of the Chief Justice, Deputy Chief Justice, Judges of Superior Courts, and Chief Registrar. It spells out the qualifications to these offices, their tenure of office and their functions. The all important institution of the Judicial Service Commission is also established and its composition and functions prescribed.

26 See art 1(3)(c) as read with Provision number 8 of Part 1 of the Fourth Schedule to the Constitution.

27 Art 159(1).

28 Ojwang’ (n 18 above) 158.

29 Art 159(2).

30 Art 160.

2.3.4 THE AUTHORITY OF CONSTITUTIONAL COMMISSIONS AND INDEPENDENT OFFICES

The Constitution of Kenya establishes ten permanent commissions³¹ and two independent offices.³² There is also established the Commission for the Implementation of the Constitution as an *ad hoc* commission³³ and a mandate vested in parliament to create other commissions with the same status as constitutional commissions, notably the Independent Ethics and Anti-Corruption Commission³⁴ and the restructuring of the Kenya National Human Rights and Equality Commission into two or more commissions with the same status as constitutional commissions.

The specific powers of these commissions are spelt out in their respective articles of establishment but overall, the commissions and independent offices are expected to protect the sovereignty of the people of Kenya, secure the observance by all state organs of democratic values and principles, and, promote constitutionalism.³⁵ The commissions and independent offices are also expected to operate subject only to the Constitution and the law, and, independent and not subject to the direction or control by any person or authority.³⁶ In a sense, these commissions and independent offices are an organ of government in their own right, independent of the other three organs of government almost in the same sense as the other three organs are independent of each other.

31 These are the Kenya National Human Rights and Equality Commission established by art 59 of the Constitution, the National Land Commission (art 67), the Independent Electoral and Boundaries Commission (art 88), the Parliamentary Service Commission (art 127), the Judicial Service Commission (art 171), the Commission on Revenue Allocation (art 215), the Public Service Commission (art 233), the Salaries and Remuneration Commission (art 230), the Teachers Service Commission (art 237) and the National Police Service Commission (art 246).

32 The Auditor-General and the Controller of Budget.

33 Art 5(1) of the Sixth Schedule to the Constitution of Kenya 2010.

34 To be established by an Act of Parliament pursuant to art 79 of the Constitution.

35 Art 249(1) of the Constitution.

36 As above art 249(2).

3 FUSION/OVERLAP OF POWER AND THE MECHANISMS FOR CHECKS AND BALANCES UNDER THE CONSTITUTION OF KENYA 2010

As adverted to at the beginning, even Montesquieu never anticipated a complete separation of the powers of state. There is need for government to operate as one complex whole. To meet this need, the design of the Constitution ought to give room for a measure of overlap of the powers and functions of state organs. This is particularly so for purposes of co-ordination and cooperation and for securing checks and balances.

3.1 FUSION OF ALL SOVEREIGN POWER IN THE PEOPLE

The greatest fusion of power, yet a very justifiable one, is the vesting of power in the ultimate sovereign, the people of Kenya. The Constitution acknowledges the ownership and possession of all sovereign power by the people of Kenya. In the spirit of limiting arbitrariness in the exercise of the said power by the institutions tasked with its exercise, the Constitution expressly demands that the power be exercised ‘in accordance with this Constitution.’³⁷ This fusion of power in the people is recognition of the people as the fountain of all power—the supreme law makers.³⁸ In any event, all the powers created under the Constitution are designed to be exercised in the best interests of the people.

The people, the beneficiaries of the power distributed should of necessity be the ultimate check as to whether the delegates have exercised power in a manner originally intended by the Constitution. There is also less danger that the people, as an entity, will misuse the power vested in them for self destruction. There are instances when the people of Kenya, as the ultimate sovereigns, exercise direct power in the management of state affairs. The first instance related to the alteration of the ‘basic structure’ of the Constitution. In the event that any proposed amendment of the Constitution of Kenya relates to a number of matters, namely; the supremacy of the Constitution,

37 As above art 1(1).

38 See K Raymond ‘Consensus of the governed: The legitimacy of constitutional change’ (1995) LXIV/2 *Fordham Law Review* 535.

territory of Kenya, sovereignty of the people, the national values and principles of governance, the Bill of Rights, the term of office of the president, the independence of the judiciary and the commissions and independent offices, the functions of parliament, the objects, principles and structure of devolved government and the provisions on the chapter on amendment of the Constitution, then such amendments are subject to approval of the people of Kenya at a referendum.³⁹ The other instance when people exercise direct power as ultimate sovereign is in respect of election of officials to offices of President and Deputy President, National Assembly, Senate, County Governor and Deputy County Governor, and County Representatives. In addition to the foregoing fusion of power, there are a number of instances of overlap of the powers of various levels of government and overlap of the functions and powers of the various organs of government.

3.2 OVERLAP OF JUDICIAL AND EXECUTIVE POWERS

In one instance, the Constitution provides for socio-economic rights as judicially enforceable rights. By their nature, realisation of socio-economic rights demands formulation of appropriate policies and prudent administration of resources by the executive. The intervention by the judiciary in appropriate cases to enforce socio-economic rights, therefore, will culminate into the judiciary interrogating the appropriateness of executive policies and the manner in which the executive utilises resources. As highlighted above, this is a real check on the executive exercise of power. The argument that enforceability of socio-economic rights tampers with the doctrine of separation of powers was considered by the South African Constitutional Court in its first certification judgment of the then draft Constitution of the Republic of South Africa.⁴⁰ In this case certain groups in civil society had contested the inclusion of socio-economic rights in the Bill of Rights of the Constitution of the Republic of South Africa on the argument that socio-economic rights were inconsistent with the separation of powers doctrine

39 Art 255(1) of the Constitution.

40 *Ex parte* Chairperson of the Constitutional Assembly: In re certification of the Republic of South Africa 1996, 1996 4 SA 744 (CC).

because they would require the judiciary to encroach upon the terrain of the legislature and executive in policy and budgetary matters. The Constitutional Court overruled this line of objection indicating that it would not endorse a rigid, formalistic interpretation of the doctrine of separation of powers that would preclude the courts from making orders with social policy or budgetary implications.

The President acting on advice of the Advisory Committee on the Power of Mercy has the power to grant a free or conditional pardon to a person convicted of an offence, postpone the carrying out of a punishment either for a specific or indefinite period, substitute a less severe form of punishment, or, remit all or part of a punishment.⁴¹ The power to try and prescribe punishment for offenders is conventionally judicial power. There is, therefore, a constitutionally sanctioned meddling by the executive in the judicial function through the instrument of the power of mercy.

Another incident of overlap of executive and judicial power relates to the role of the President in the appointment of judicial officers of superior courts. Under the Constitution, it is the President who formally appoints the Chief Justice and the Deputy Chief Justice in accordance with the recommendation of the Judicial Service Commission and subject to approval by the National Assembly.⁴² The latter requirements, namely, recommendation by the Judicial Service Commission and approval by the National Assembly is a means of checking the exercise of power by the President to avoid overriding political considerations in the process of appointment of the said judicial officers. With respect to the other judges of the Supreme Court, the Court of Appeal and the High Court, the President appoints them in accordance with the recommendation of the Judicial Service Commission.⁴³ Barring the obvious checks in the exercise of the power of appointment by the President of judicial officers there is a clear overlap of executive power over the judicial function of the state.

41 Art 133(1) of the Constitution of Kenya.

42 As above art 166(1)(a).

43 As above art 166(1)(b).

A related overlap to the power of appointment is the power of removal from office of a judge of the superior court. In this case, the President upon receiving a petition from the Judicial Service Commission setting out the grounds upon which a judge should be removed from office, then suspends the judge and proceeds to appoint a tribunal to inquire into the matter and report on the facts and making binding recommendations to the President.⁴⁴

3.3 OVERLAP OF EXECUTIVE POWER AND LEGISLATIVE POWER

As noted above, subject to meeting the constitutional criteria expressly specified, an Act of Parliament or legislation of a county may confer on any state organ, state officer or person the authority to make provision having the force of law.⁴⁵ This chapter opines that what is anticipated here is the power to make delegated legislation conferred upon executive and other administrative officers and institutions. It is conceded that the need to delegate law making power is an absolute necessity but it can be subject to abuse by the delegate hence the need for the restrictions specified in the Constitution.

Whereas the duty to apply national revenue is that of the executive in the performance of its functions of service delivery, that duty is subject to the oversight of the legislative organs, namely the National Assembly and the Senate. In this regard, the National Assembly; determines the allocation of national revenue between the levels of government, appropriates funds for expenditure by the national government and other national state organs, and, exercises oversight over national revenue and its expenditure.⁴⁶ Further, the National Assembly, as an integral part of its core mandate, reviews the conduct in office of the President, the Deputy President and other State Officers and initiates the process of removing them from office. This is in addition to exercising oversight of state organs.⁴⁷ The Senate, on the other hand, participates in the oversight of

44 As above art 168(5), (7) & (9).

45 As above art 94(6).

46 As above art 95(4).

47 As above art 95(5).

State Officers by considering and determining any resolution to remove the President or Deputy President from office under the Constitution.⁴⁸

3.4 OVERLAP OF LEGISLATIVE POWER AND JUDICIAL POWER

Parliament makes laws whose interpretation is a function of the judiciary. Indeed, in its prescriptions on the independence of the judiciary, the Constitution provides that the judiciary is subject only to the Constitution and the law.⁴⁹ The power to make a provision having the force of law in Kenya, as indicated above is a preserve of Parliament. There is, therefore, a sense in which the judicial function is constitutionally and of necessity made dependant on the legislative function. Under the Constitution, if a question as to the removal of the Chief Justice from office arises and is properly referred to the President, the President is under a duty to appoint a tribunal chaired by the Speaker of the National Assembly to inquire into the matter.⁵⁰ As noted above, the very appointment of the Chief Justice and his Deputy by the President are both subject to approval by the National Assembly. It is a clear case of the National Assembly, primarily a legislative organ, having a say over the affairs of the judiciary.

The exercise of many judicial institutions established by the Constitution and the establishment and functioning of many judicial institutions anticipated under the Constitution is left to parliamentary Acts. For instance, the Constitution has given Parliament authority to pass an Act to make further provision for the operation of the Supreme Court.⁵¹ In respect of the High Court, the number of judges as well as the organisation and administration of the Court are both subject to prescription by an Act of Parliament.⁵² In further exercise of power over the functioning of the judiciary, Parliament has been vested with the power to enact legislation to establish

48 As above art 96(4).

49 As above art 160(1).

50 As above art 168(5)(a)(i).

51 As above art 163(9).

52 As above art 165(1).

courts with the status of the High Court to deal with employment and labour relations issues as well as environment and the use and occupation of, and title to, land.⁵³ In addition to establishing the courts, Parliament has also been constitutionally mandated to determine the jurisdiction and functions of the said courts.⁵⁴ In the same breath, Parliament has been constitutionally mandated to enact legislation conferring jurisdiction, functions and powers on Subordinate Courts.⁵⁵ With specific reference to the Kadhis' Courts, in addition to the Chief Kadhi, the number of other Kadhi's is to be set by Parliament, subject to the constitutional minimum of three.⁵⁶

3.5 OVERLAP BETWEEN POWERS OF INDEPENDENT OFFICES AND CONSTITUTIONAL COMMISSIONS AND OTHER ORGANS OF GOVERNMENT

Among the objects of Constitutional Commissions and Independent Offices established by or under the Constitution of Kenya 2010 is 'to secure the observance by all state organs of democratic values and principles'⁵⁷ and 'promotion of constitutionalism.'⁵⁸ These are mechanisms of checks and balances in the exercise of public power by state organs. In securing 'the observance by all state organs of democratic values and principles' the independent offices and constitutional commissions have the constitutional sanction to 'meddle' into the workings of other organs of government to monitor compliance. Constitutionalism, almost similarly, embodies a system of governance that is subject to sufficient and practical checks, counter-checks and balances in contradistinction to arbitrary government of men.⁵⁹ It follows, therefore, that independent offices and constitutional commissions are under a constitutionally sanctioned objective to 'poke their noses' into the affairs of other state organs to ensure that they exercise their powers in a manner that is within the bounds defined by the Constitution and other law.

53 As above art 165(2).

54 As above art 165(3).

55 As above art 169(2).

56 As above art 170(1).

57 As above art 249(1)(b).

58 As above art 249(1)(c).

59 Kangu (n 2 above).

4 CONCLUSION

This chapter set out to examine the extent to which the design of the Constitution of Kenya 2010 gave regard to the essential doctrine of good governance of separation of powers. Whereas the full realisation of the promises of the Constitution of Kenya 2010 depends on a number of other factors most importantly being the political will of every institution to play its role and the tireless vigilance of the people of Kenya, in many respects, the supreme law adequately separated the powers of the state and created such overlaps as were necessary for purposes of ensuring moderation in the exercise of state power.

CHAPTER SEVEN

DEVOLVED GOVERNMENT

STEVE O ODERO*

1 INTRODUCTION: DEVOLVED GOVERNMENT AS A FORM OF DECENTRALISATION

In the most general of terms, decentralisation refers to the transfer of authority from a central government to a sub-national entity.¹ Beyond this general definition, the process of decentralisation is a complex undertaking, taking on different meanings in different contexts and according to the desires and plans of those in charge of its design and implementation.

1.1 FORMS OF DECENTRALISATION

There are various ways in which a government may decentralise power to the sub-national level. These are de-concentration, delegation and devolution or devolved government. De-concentration is the delegation of certain decision making powers to lower, provincial or local levels of the central government.² It has a peculiar characteristic in that it is one and at the same time a form of centralisation and decentralisation. In this case, decision making authority is shifted from one locality (the capital) and one individual (the president) to lower levels of the government.³ However, although financial and management responsibility may be shifted to the local units, there remains the hierarchical dependence of the local authority to the central government for appointments, assignments and salaries.⁴

* PhD (University of Rome, Luiss Guido Carli); LLM (University of Pretoria); LLB (University of Nairobi).

1 S Boko *Decentralisation and reform in Africa* (2002); D A Rondinelli (eds.) *Decentralisation and development: Polity implementation in developing countries* (1983) 19.

2 Sylvain (n 1 above).

3 As above.

4 R Crook & J Manor *Democracy and decentralisation in South-East Asia and West Africa: Participation, accountability, and performance* (1998) 11– 12. See also Boko (n 1 above); Cheema & Rondinelli (n 1 above).

De-concentration is the weakest form of decentralisation used mostly in unitary states. This is the typical system of government that Kenya operated under since 1979. Despite its limitations, de-concentration, if properly carried out (e.g. if the central government provides its local representatives with the means to adequately carry out their devolved functions) can help improve the efficiency and effectiveness of public good provision and service delivery. The case of Rwanda is often given as a case in point. The presumption under a de-concentrated arrangement is that the central government's local representatives are closer to the local populations and can better respond to the local interests than decision makers in the capital city. However, as illustrated above, it does not involve any real transfer of authority; and does not involve independent local governments that are wholly elected or accountable to the local populations. As such any benefit of de-concentration in responding to the preferences of the local communities is limited and largely dependent of political will.

In the case of delegation, the responsibility for decision making with respect to public functions administration is transferred to the semi-autonomous organisations or units that are not wholly under the control of government.⁵ Such organisations as housing or transportation authorities, public enterprises, regional development corporations etc. may enjoy ample discretion in decision making and may not be subject to the same constraints as regular service personnel.⁶ They may even be able to charge user fees. Delegation remains a limited form of decentralisation with the difference between it and full political decentralisation being that the lower level organisations to which power is transferred remain ultimately accountable to the central government. Delegation is a more extensive form of decentralisation than de-concentration and it is one way to balance local and national government interests. In some cases it may involve a principal-agent type of a relationship in which the central government is the principal and local organisations are

5 W Oyugi 'Decentralisation for Good Governance and Development' (2000) 21 *Regional Development Dialogue* 3.

6 As above.

the agents.⁷ In that case an issue that arises concerns finding ways to provide incentives that will induce the local, self-interested agent to behave in ways that are as close as possible to the central government's wishes, the principal situation.

Devolution or devolved government is a form of decentralisation in which the authority for decision making with respect to finance and management is transferred to quasi-autonomous units of local government.⁸ In other words, devolution is a political concept that denotes the transfer of political, administrative and legal authority, power and responsibility from the centre to lower level units of government created by the national Constitution. In a devolved political system, the lower level units of government to which power, authority and responsibility have been transferred (devolved) are more or less autonomous from each other.⁹ This means that any one level of government is not under any obligation to refer to or seek authority from the centre in order to make and or implement decisions that fall within their exclusive jurisdiction. Devolution forms the foundation for political decentralisation in that it usually involves the transfer of responsibilities to municipalities that elect their own mayors and councils, raise their own revenues and are able to make investment decisions independently of the central government. In such a system, local governments have legally recognised geographical boundaries within which they exercise their authority and perform public functions.

1.2 THE CONTENT OF DEVOLUTION

Decentralisation may be political, administrative, fiscal or economic. Given that this chapter deals with devolved government as the form of decentralisation under the Constitution of Kenya 2010, the following segment discusses these three methods of decentralisation under the banner of devolution. Administrative devolution

7 Oyugi (n 5 above).

8 J C Ribot 'African decentralisation: Local actors, powers and accountability, democracy, governance and human rights' United Nations Research Institute for Social Development, Democracy, Governance and Human Rights Programme Paper Number 8 (2002) 7.

9 As above.

refers to the transfer of responsibility for the planning, financing and management of selected public functions from the central government to lower tier units of the government.¹⁰ These might be field units of government, semi-autonomous public authorities or corporations or regional authorities.

Political devolution consists of the creation of sub-national levels of government that are endowed with autonomous decision-making power.¹¹ Generally, political devolution is more likely to be successful when conducted within the framework of a multiparty, participatory, grassroots-based system. The sub-national entities (state, provincial, district governments, municipalities or counties as the case may be) to which power is devolved in the course of political devolution must be legitimately elected local governments which have legal authority conferred onto them by the people who elected them and enjoy financial autonomy. Constitutional or statutory reforms are often required to strengthen political devolution and establish the credibility of the process.

These reforms must confer upon local communities the abilities to freely elect their representatives and the right to self-determination within the law. For example the Constitution of Benin, adopted in December 1990, engages the country on the path of devolved government through elected councils.¹² Subsequently, five different laws have been passed to facilitate the implementation of this process.¹³ In the Constitution of Mali, under Articles 97 and 98, the autonomy of local communities is provided for and a subsequent implementation law determines the specific structure and functions of devolved local communities.¹⁴ Likewise, the Constitution of Burkina Faso devotes Articles 143-145 to the creation of autonomous local communities and various legislative pieces thereafter spell out the specifics of the devolution process.¹⁵ The Constitution of Kenya 2010 is the most explicit of the examples

10 See Cheema & Rondinelli (n 1 above).

11 As above.

12 Boko (n 1 above) 17.

13 Boko (n 1 above) 18.

14 As above.

15 As above.

so far given devoting an entire chapter comprising of 27 articles to 'Devolved Government.' In the Kenyan case as well, Article 200 provides for the enactment of legislation to specify the details of the process of devolution but a fairly comprehensive outline of the structures and functions of autonomous local governments is constitutionally enshrined lending the ensuing process hefty weight by reducing the possibility of political manipulation through various interpretations of the Constitution.

Fiscal devolution refers to the definition and alignment of monetary functions among the different levels of government.¹⁶ The responsibilities of which level of governments sets and collects taxes or which tier undertakes what expenditures ought to be clearly spelt out. Fiscal devolution if not clearly structured may altogether derail an otherwise plausible devolution program; that is if it is not made clear how local governments are to raise the revenues that they need to face their new responsibilities. A fiscal devolution program must in a straightforward way delineate whether and on what basis local governments can self-finance or recover costs through user charges. It must clearly specify what types and what levels of intergovernmental transfers are undertaken; whether municipalities or counties as the case may be can expand local revenues through property taxes, sales taxes or indirect taxes; whether there is to be any type of co-financing arrangements between the central government and local government; and whether municipalities have the authority to borrow and mobilise funds from local, national or international sources.

Economic or market devolution consists of privatisation and deregulation.¹⁷ Both of these forms of reforms shift the responsibility for provision of goods and delivery of services from the central government to the private sector. When a government undertakes economic or market devolution reforms, it allows functions that had previously been the primary responsibility of the state to be carried out by private corporations, community groups, cooperatives and

16 P Smoke 'Fiscal decentralisation in developing countries: A review of current concepts and practice' United Nations Research Institute for Social Development, Democracy, Governance and Human Rights Programme Paper Number 2 (2001) 9.

17 As above.

non-governmental organisations.¹⁸ Generally, economic devolution takes place within the framework of an economic liberalisation program. It can only succeed if the legal constraints on private sector participation in service provision and delivery are removed, thereby allowing competition to take hold between the different private providers.

More often than not, these different styles of devolution are carried out simultaneously making it a fairly complex process. In the end, a well designed program of devolution must contain all four approaches to devolution. Political devolution without administrative devolution is possible but probably ineffective. By the same token, the devolution of administrative and political decision making powers to the lower tiers of government without proper financial authority is most likely short-lived. Finally, economic devolution is important because the private sector is often more creative than government entities in devising efficient ways of producing and providing a given good or service, making government provision of such a good or service an inefficient use of societal resources.

2 THE ROAD TOWARDS DEVOLVED GOVERNMENT IN KENYA: BRIEF HISTORICAL NARRATIVE

Kenya's journey towards the present-day devolved system can be traced to a decentralised arrangement in the form of de-concentration or the designation of certain decision-making powers to lower, provincial or local levels of the Central Government. Kenya has operated under this de-concentrated system through a local government system (provided for under the Local Government Act Cap 265 Laws of Kenya) which had a majority of the structures of a devolved system save for the lack of autonomy of the local levels and their immense subordination to the central government. This local government system has its roots in the colonial period with the passing into law of the Village Headmen Ordinance in 1902

18 As above.

giving Provincial Commissioners (PCs) powers to appoint locals to be official headmen of a village or group of villages.¹⁹

The headmen were charged with the maintenance of law and order, help in the collection of taxes and in the arbitration of minor cases in the village. In 1903, the colonial government introduced the Township Ordinance for the areas of Nairobi and Mombasa (which were the exclusive preserve of the white settlers) to be run by a District Commissioner (DC).²⁰ In 1912 the Local Authority Ordinance was passed setting up a native authority system which failed to be implemented because the colonial government and the settler community could not agree on the actual mechanics, functions and compositions of the authority system.²¹ In 1924, the Local Native Councils were established under the Native Authority Ordinance. Their main objectives were to encourage and develop a sense of responsibility and duty towards the upcoming state amongst the chief elders and the native population. The Local Native Council was composed of the DC, Assistant DC, Headmen and other locals appointed by the PC.²² In 1926, a Local Government Commission was established to make recommendations on the structure and functions of a local government system in Kenya. Some of its recommendations were:

- a) A policy of separate development based on the segregation of the different races;
- b) The establishment of District Councils in the settled area comprising of elected officials;
- c) The exclusion of Townships from the District Councils which were to have their own advisory committees.²³

In 1928, the Local Government District Councils Ordinance was passed establishing District Councils in settled areas. The Municipal

19 G Njogu 'Local Government system in Kenya Cap 265, Laws of Kenya: A presentation to the North- South cooperation between Municipal Council of Nyahururu and the Municipalities of Hatulla and Janakal of Finland on the 23rd August to 7th September (Unpublished).

20 As above.

21 Njogu (n 19 above).

22 As above.

23 As above.

Councils Ordinance was also passed elevating Nairobi and Mombasa to the status of Municipalities. In 1930, the Revised Township Ordinance was passed creating two grades of Townships A and B. The DC was mandated to run the grade B Townships exclusively and grade A Townships with the help of an advisory committee. In 1937, a new Native Authority Ordinance was passed providing that Councillors to the Local Native Councils had to be elected by the people. In 1946, Locational Councils were created within the Local Native Councils to provide lower level self rule for the locals.²⁴ In 1950, the Local Government African District Ordinance was passed elevating the Local Native Councils to African District Councils giving the African District Councils a number of powers like that to enter into contracts on their own behalf.²⁵

In 1952, the County Councils Ordinance created the District Councils, County Councils, Urban District Councils and Rural District Councils.²⁶ In 1963, Local Government Regulations were passed establishing a new system of African District Councils.²⁷ Thereafter in 1968, the Transfer of Functions Local Government Act was passed stripping the Local authorities of key responsibilities and transferring them to the Central Government.²⁸ Some of the powers withdrawn from the local authorities were those of public health, education and road services. The only authorities that maintained a measure of power in these areas were the Municipalities and County Councils. In 1977, the Central Government officially became the major provider of these responsibilities with the enactment of the Local Government Act. Additionally, local authorities lost their financial stability with the abolishment of the Graduated Personal Tax (GPT).²⁹

24 As above.

25 As above.

26 As above.

27 As above.

28 As above.

29 As above.

3 PRESENT-DAY (TRANSITIONAL) LOCAL GOVERNMENT SYSTEM

The present-day local government system in Kenya is created under the Local Government Act Cap 265 of the Laws of Kenya (LGA) which establishes the various categories of local authorities. These categories comprise of Municipal Councils, County Councils and Town Councils. Municipal Councils are urban local authorities which are larger than County Councils and Town Councils. County Councils cover the rural country-sides and are formed along district administrative boundaries. They provide services to rural area residents and have a structure similar to that of the Municipal Councils except that they are presided over by Chairmen instead of Mayors.³⁰ Town Councils are towns whose physical and population structure are a notch lower than those of Municipal Councils. They are towns waiting to be elevated to Municipal status upon attaining improved attributes.³¹

3.1 LOCAL GOVERNMENT STRUCTURE

The local authorities are structured along civic and administrative functions. The civic functions are vested in elected and nominated councillors, the latter who should not exceed one third of the total number. Administrative functions are vested in the Town Clerks in the case of Municipal Councils and Town Councils and County Clerks in the County Councils.³² Other key administrative officers include the Treasurers, Engineers and Public Health Officers. Each local authority has the clerks department, treasurers department, work department and the environment department. In smaller local authorities, the environment and work departments are fused into one. It is noteworthy that Municipal Councils are headed by Mayors while County and Town Councils are headed by Council Chairmen.

30 As above.

31 As above.

32 R Southall & G Wood 'Local Government and the return to Multi-partyism in Kenya' (1996) 95 *African Affairs* 501.

3.1.1 THE FUNCTIONING OF LOCAL GOVERNMENT: THE COMMITTEE AND FULL-COUNCIL SYSTEM

The local authorities function under a committee and full council system.³³ Under this system, each local authority has a committee comprising members of the council supervised by the various relevant departmental heads. Matters pertaining to each of these departments are brought before the committee through notices of motion where they are deliberated upon and resolutions made.³⁴ The manner and conduct of the debate is provided for by the LGA. Resolutions made at the committee level have to be tabled before a full council meeting which is the highest organ in the council under the chairmanship of the Mayor or Council Chairman and comprised of the elected and nominated councillors. Once such a resolution is adopted at the full council meeting, it becomes policy. This policy then has to be approved by the Minister for Local Government, in the essence the Central Government.

3.1.2 LOCAL GOVERNMENT'S POWER TO LEGISLATE

Local authorities can enact by-laws which are prohibitions on the conduct of persons within the various authorities that may disrupt public order and smooth running of socio-economic activities therein.³⁵ These laws cover areas of general nuisance, health, environment and conduct of business. The supervisory and regulatory role of the council is performed through the application of these laws.

As typical in a de-concentrated system of government, the Minister for Local Government in this case representative of the Central Government has immense powers rendering the system far from any resemblance of a devolved arrangement. The Minister under the LGA has the powers in effect to approve or disapprove all matters resolved by the local authorities. With the enactment of the Constitution of Kenya 2010 which provides for a more comprehensive system of devolved government under Chapter 11,

33 Local Government Act (Cap 265 Laws of Kenya).

34 As above.

35 As above.

the current law is likely to be repealed and new legislation on the new system put in place. In fact, ostensibly foreseeing such a move, Article 18 of the new Constitution provides that all local authorities established under the LGA existing immediately before the effective date continue to exist subject to any law that might be enacted.

4 DEVOLVED GOVERNMENT UNDER CHAPTER ELEVEN OF THE CONSTITUTION

The principle of devolution or devolved government involves shared governance at the national level and self-governance at the devolved level.³⁶ At the national level, concise sharing mechanisms ensure that the concept of shared governance is realised while the same can be said of the devolved level which is fitted with similar self-governance mechanisms. The degree of devolution varies from one system to another. In certain instances, all three conventional national government functions i.e. executive, legislative and judicial are shared between the various tiers of government.

In other instances, there is only a partial devolution of these functions. The choice as to what extent these functions are devolved depends on the specific needs of the society for which they are so being devolved. With the enactment of the new Constitution of Kenya 2010, central to the organisation of government in Kenya is the principle of devolved government. Under this principle, Kenya operates under two constitutionally autonomous levels of government: the National Government and the County Government. This division plays an important role in the determination and implementation of public policy and the management of public finances. This segment discusses the basic framework and operation of devolved government in Kenya with specific emphasis on the different levels of government, the formal division of powers, the operation of fiscal devolution and the key means of interaction or relationship between the different governments.

36 J M Kangu 'Constitutionalism: A comparative analysis of Kenya and South Africa' *Moi University Law Journal* (2008) 2/1 105.

4.1 NATIONAL GOVERNMENT IN KENYA

While there isn't a specific section defining the National Government as exists for example in the Canadian Constitution,³⁷ a concerted reading of Article 1(3) outlines the National Government as comprising of the Executive, Legislature and Judiciary. It is noteworthy that save for the Judiciary, certain Executive and Legislative functions are shared between the National Government and the County Governments. This chapter discusses Chapter Eleven of the new Constitution which focuses on the County Government and will refer to the National Government in so far as it seeks to explain how the devolved system is intended to function. The National Government is examined in more detail under the chapter dealing with separation of powers.

4.2 COUNTY GOVERNMENT SYSTEM

The County Government comprises of the County Assembly and the County Executive Committee.³⁸ The County Assembly is comprised of elected members representing the various wards within the county and has legislative authority conferred upon it by Article 185(1). County Assembly members are not explicitly referred to as councillors in the chapter; it remains to be seen the term to be accorded to the elected representatives of the various wards as envisaged in the Constitution. The County Assembly has the power to make any laws necessary for or incidental to, the effective performance of the functions and exercise of the powers of the County Government as stipulated under the Fourth Schedule.³⁹

Additionally, a County Assembly, while respecting the principle of the separation of powers, may exercise oversight over the County Executive Committee and any other county executive organs.⁴⁰ It may also receive and approve plans and policies for the management and exploitation of the county's resources and the development and

37 Government of Canada 'Constitution Acts 1867 to 1982' available at <http://laws.justice.gc.ca/en/const/index.html> (accessed on 11 November 2010).

38 Constitution of Kenya art 176(1).

39 As above Fourth Schedule.

40 As above.

management of its infrastructure and institutions.⁴¹ The County Executive Committee is headed by a Governor, deputised by a Deputy Governor (who are both directly elected by the electorate) and other members appointed by him with the approval of the County Assembly, from among persons who are not members of the Assembly.⁴² The Committee is mandated to:

- a) implement county legislation;
- b) implement, within the county, national legislation to the extent that the legislation so requires;
- c) manage and coordinate the functions of the county administration and its departments;
- d) perform any other functions conferred on it by the Constitution or national legislation.⁴³

The County Executive Committee may also prepare proposed legislation for consideration by the County Assembly and provide the Assembly with full and regular reports on matters relating to the county.⁴⁴

4.3 DISTRIBUTION OF FUNCTIONS BETWEEN THE NATIONAL GOVERNMENT AND THE COUNTY GOVERNMENTS

The Fourth Schedule to the Constitution grants various powers to the National and County Governments. The National Government has control over foreign affairs, foreign policy and international trade, the use of international waters and water resources, immigration and citizenship, the relationship between religion and state, language policy and the promotion of official and local languages, national defence and the use of the national defence services, courts, intellectual property rights, labour standards, consumer protection, including standards for social security and professional pension plans, education policy, standards, curricula, examinations and the granting of university charters.⁴⁵ Other powers of the National

41 As above.

42 As above.

43 As above.

44 As above.

45 As above Fourth Schedule.

Government include agricultural policy, universities, tertiary educational institutions and other institutions of research and higher learning and primary schools, special education, secondary schools and special education institutions.

The County Governments share Executive and Legislative functions (the exact degree of both functions to be determined by implementing legislation) with the National Government in areas of agriculture, health services, education, transport and communications, veterinary policy, housing and public works just to mention a few.⁴⁶ In these areas of shared jurisdiction decisions on the structure and management will have to be based on the principle of shared governance earlier discussed. These areas can be referred to as those in which concurrent powers are vested both levels of government. The nature of these powers will presumably be detailed in implementing legislation which is to follow as provided for in the Fifth Schedule.

International constitutional practice has shown that distribution of functions in a devolved system of government, Kenya included, is not cast in stone and may be changed through either constitutional amendments or judicial interpretation of these functions.⁴⁷ On changes through constitutional amendments, Chapter 16 provides for the procedure to be followed to effect such a change. Given that an amendment relating to the distribution of functions between the two levels of government touches on the structure of the devolved system of government as envisaged under Article 255(1)(i), such procedure must involve the introduction of a Bill in either Houses of Parliament and its passing in both Houses. After Presidential Assent, the Bill must be put before a national referendum in which a simple majority is required to make the Bill law.⁴⁸ As for changes through judicial interpretation, the Courts under Chapter 10 are given a constitutional role to make decisions on issues touching on the Constitution including its interpretation. As is the case in the Commonwealth, these judicial decisions can in turn, have

46 As above.

47 Kangu (n 36 above).

48 Constitution of Kenya 2010.

transformational impacts on the nature and operation of Kenya's devolved system of government.

4.4 KEY ELEMENTS OF FISCAL DEVOLUTION IN THE KENYAN SYSTEM

Fiscal devolution refers to the complex interrelationship between the National Government and the County Governments in the area of finance.⁴⁹ Four elements are central to this financial interrelationship namely: national-county taxation powers, revenue allocation, financial equalisation and county revenue funds.

4.4.1 NATIONAL-COUNTY TAXATION POWERS

Both the National and County governments have the constitutional power to impose certain direct forms of taxation. Under Article 209, only the National government may impose income tax, value-added tax, customs duties and other duties on import and export goods and excise tax. County governments on the other hand may impose property rates, entertainment taxes and any other tax that it is authorised by law. From the foregoing provisions, it is apparent that the responsibility for revenue generation is unequally distributed between the national, county spheres of government. The National government's taxation power is much more far-reaching while the County government has limited taxation and borrowing powers. Under Article 212, a County government has the power to borrow funds from whatever source so long as the sum to be borrowed can be guaranteed by the National government in addition to being approved by its local Assembly.

4.4.2 REVENUE ALLOCATION: COMMISSION ON REVENUE ALLOCATION

Part 4 of Chapter 12 provides for the equitable sharing of revenue raised by the National Government. Article 215 establishes a Commission on Revenue Allocation for this purpose.⁵⁰ The Commission consists of a chairperson, nominated by the President and approved by the

⁴⁹ Kangu (n 36 above).

⁵⁰ Constitution of Kenya 2010.

National Assembly; two persons nominated by the political parties represented in the National Assembly according to their proportion of members in the Assembly; five persons nominated by the political parties represented in the Senate according to their proportion of members in the Senate and the Principal Secretary in the Ministry of Finance.⁵¹ Article 216 which provides for the functions of the Commission stipulates that its principal function is to make recommendations concerning the basis for the equitable sharing of revenue raised by the National Government between the National and County governments; and among the County governments. The Commission is also mandated to make recommendations on other matters concerning the financing of, and financial management by, County governments, as required by the Constitution and national legislation.⁵²

The basis for allocating a share of the national revenue to the counties is determined by the Senate once every five years by resolution.⁵³ In determining the basis of revenue sharing, the Senate is required to take into account the criteria under Article 203(1) into account (which provides a detailed list of criteria for determining the 'equitable shares'). The Senate is also required to request and consider recommendations from the Commission on Revenue Allocation, consult the County Governors, the Cabinet Secretary responsible for finance and any organisation of County governments; and invite members of the public, including professional bodies, to make submissions to it on the matter.

4.4.3 FINANCIAL EQUALISATION IN THE NEW CONSTITUTION

The purpose of the introduction of the concept of financial equalisation in the Constitution is in line with a commitment to fairness and equity which are central to the overall objective of devolved government under Article 174.⁵⁴ In an ethnically diverse country like Kenya, financial equalisation is meant to ensure that across the country, people have access to reasonably comparable

51 As above.

52 As above.

53 As above.

54 As above.

public services at reasonably comparable levels. Kenya is not the only country that provides for a mechanism for redistributing national revenues and addressing disparities among Counties or Provinces in other jurisdictions. In fact, many countries that are federations or practice some form of devolved government involving a central government and several regional governments have similar equalisation systems. Examples are Germany, Switzerland, Australia, India, Pakistan, and South Africa. The United Kingdom for example, has an equalisation approach that takes into account the special fiscal needs of Scotland, Wales, and Northern Ireland.⁵⁵ The following can be deduced as the basics behind the incorporation of financial equalisation as provided for in the Kenyan Constitution:

- a) In accordance with Article 204(1), the equalisation programme is funded entirely by the national government using taxes paid by Kenyans across the country and not from one or more regions.
- b) The objective of the programme is to address the economic marginalisation of defined areas of the country. Article 204(2) provides that the Equalisation Fund established thereunder shall only be used to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation. In the essence, those areas or groups that have less ability to pay for public services are entitled to equalisation payments.
- c) According to Article 204(2) read together with 204(3)(b), the equalisation payments an area or group receives from the National Government may be conditional; that is they may have strings attached. In such instance the areas or groups have to account to the National Government on how these funds are put to use.
- d) Equalisation is only designed to raise the areas or groups up to a common standard. Areas that enjoy provision of basic services above the common standard do not see any reductions as a result of equalisation.

55 Achieving a National Purpose: Putting Equalisation Back on Track, Expert Panel on Equalisation and Territorial Formulae.

- e) Equalisation is designed to fill the gap between an area's own capacity to provide basic services to its inhabitants and a common standard across the country. It is not designed as a permanent entitlement. As an area's or group's wealth increases, the principle dictates that it should receive less money in equalisation payments and none whatsoever if its capacity to provide attains the common standard.⁵⁶

4.4.4 COUNTY REVENUE FUNDS

Article 207(1) establishes a Revenue Fund for each County government, into which all moneys raised by or on behalf of the County government are paid with the exception of money reasonably excluded by an Act of Parliament. These moneys can only be withdrawn from the Revenue Fund only as a charge against the Fund that is provided for by an Act of Parliament or by legislation of the county or as authorised by an appropriation by legislation of the county.⁵⁷ Furthermore, money shall not be withdrawn from the Fund unless the Controller of Budget has approved the withdrawal. An Act of Parliament may make further provision for the withdrawal of funds from a County Revenue Fund and provide for the establishment of other funds by counties and the management of those funds.

5 ISSUES FOR CONSIDERATION IN THE ENACTMENT OF IMPLEMENTATION LEGISLATION

5.1 FINANCIAL EQUALISATION AND COMPOSITION OF THE REVENUE ALLOCATION COMMISSION

In a devolved system of governance with a financial equalisation program, the most important institution in the realisation of the concept of equalisation is the Revenue Allocation Commission which may be referred to differently depending on the jurisdiction. Given that the function of this Commission is normally to make recommendations to both Parliament and Provincial or County

56 J Marshall 'Seven issues in equalisation: A discussion' (2005) available at <http://www.eqtf-pftt.ca/submissions/SevenIssuesinEqualization.pdf> (accessed 10 November 2010).

57 Constitution of Kenya 2010.

Legislatures (in the case of Kenya) on the equitable sharing of national revenue between the national and local spheres of government, its structure and composition is of paramount importance. In the case of South Africa, the creation of a Financial and Fiscal Commission (FFC) with a membership drawn from all the nine provinces of the country, enabled the de-politicisation of the revenue sharing process and averted a stalemate in the promulgation of the 1996 Constitution.⁵⁸

It was argued that whereas political parties are engines through which the people express their values and views on governance, pegging revenue allocation on political party representation in Parliament would be unsound because this would mean subjecting the peoples of minority party representations to the desires of those of majority party representation. For example, if the Western Cape Province is a Democratic Alliance Party (DP) zone but the majority party in Parliament is the African National Congress (ANC), the FFC would be structured with a majority ANC representation. In this way, the DP and its followers in the Western Cape, would subject to the wishes of ANC representation irrespective of their majority support for the DP within their own province defeating the object and purpose of devolved governance.

Precariously, in Kenya, Article 215 of the Constitution which establishes the Commission on Revenue Allocation provides that its membership shall comprise of *inter alia* persons nominated by the political parties represented in the National Assembly and Senate according to their proportion of members in the Assembly or Senate respectively.⁵⁹ While it may be explicable that this provision must have been arrived at owing to the political temperatures at the time, so as to reach a compromise, it is gravely erroneous. Just as in the case of South Africa illustrated above, pegging the membership of the Kenyan Commission on Revenue Allocation on political party representation in either house of Parliament, would subject counties with minority party representation to the desires of the majority party irrespective of their majority stature within their counties.

58 Art 220 Constitution of South Africa 1996.

59 Constitution of Kenya 2010.

An example would be where the Orange Democratic Movement (ODM) has a majority in both houses of Parliament and the Party of National Unity (PNU) has a minority in the same. Taking an example of a PNU stronghold County such as Nyeri County, ODM through its numerical advantage in the Commission would have the power to influence revenue allocation to Nyeri County overriding the wishes and concerns of *bona fide* representatives of the County. Inasmuch as this influence may be legitimate in its own right, it is subject to party politics thereby leaving the county residents and their representatives subject to the majority irrespective of how well informed their concerns may be. This state of affairs would go against the fundamental concept of shared governance which is central to any devolved system.

5.2 DEVELOPMENTAL DEVOLVED GOVERNMENT

Devolved government has been introduced into Kenya's constitutional landscape with numerous promises chief amongst them is the equal distribution of national resources and the reduction of poverty.⁶⁰ This section explores the potential contribution of fiscal devolution in alleviating poverty in Kenya. In 2001, recognizing the need to assist impoverished nations more aggressively, United Nations (UN) member states adopted the Millennium Development Goals (MDGs). The MDGs are eight international development goals that all 192 UN member states and at least 23 international organisations have agreed to achieve by the year 2015. They include eradicating extreme poverty, reducing child mortality rates, fighting disease epidemics such as AIDS, and developing a global partnership for development. Whereas Kenya has some of the continent's wealthiest individuals, it is home to one of the world's largest slums. The Kenya Household Budget Survey (KHBS) suggests that in 2005/6 almost half of the population (47 percent) lived in poverty, of which 85 percent were in rural areas.⁶¹

60 H W O Okoth-Ogendo 'The politics of constitutional change in Kenya since independence: 1963-1969' (1972) 71 *African Affairs* 9.

61 'Kenya poverty and inequality assessment Volume I: Synthesis report' (June 2008) Poverty Reduction and Economic Management Unit Africa Region.

The eradication of poverty, and of related conditions such as inequity and unequal access to basic social needs, is an essential part of Kenya's development agenda, following the government's recognition that long-term political and social stability will otherwise be unattainable. Some elements require action by the National government, while others put the onus on County governments. Within the framework of fiscal devolution County governments are set to play an important role in the growth and development of Kenya and by implication in the alleviation of poverty going by the objectives of devolution as set out in the Constitution. In exploring the responsibilities of County governments in alleviating poverty, this section will provide a workable definition of the pro-poor development concept, conceptualise fiscal devolution as a key component of poverty alleviation strategy and discuss the sharing of social responsibilities between the two levels of government in the context of poverty alleviation. Finally, it will examine the relationship between fiscal devolution and the principles of good governance.

5.3 DEVOLVED GOVERNMENT AND POVERTY ERADICATION

Poverty, which has been defined as the inability to attain a minimal standard of living, has been measured in terms of basic consumption needs or the income required to meet these needs. An important rationale for devolved government is that County governments are closer to the people, therefore better equipped to obtain information on local preferences, needs at lower cost, and are more likely to conceive and implement pro-poor policies.⁶² Fiscal devolution is meant to boost public-sector efficiency in service delivery, so that the scarce public resources expended on health, education and other social services. It can generate gains in financing, efficiency and quality by devolving resources and decision-making powers to sub-national governments for the delivery of services. Fiscal devolution also enhances the accountability and transparency of public institutions in policy-making by bringing expenditure assignments closer to revenue sources and hence to the citizenry. The quality of

62 Y Etienne 'Understanding fiscal decentralisation in South Africa' available at <http://www.idasa.org.za> (accessed on 12 January 2011).

service provision can also be enhanced since County governments will be more sensitive to variations in local requirements and open to feedback from the users of services.

Therefore, fiscal devolution can be applied in poverty alleviation strategies in a number of ways: firstly, to provide opportunities to the poor; secondly, to empower the poor to take advantage of these opportunities; and thirdly, to protect the poor against their own vulnerability.⁶³ All these steps involve the implementation of pro-poor interventions within the framework of cooperation between the two levels of government. However, the flipside of this argument is that if not properly implemented devolved government can be a way for the National government to avoid carrying out its responsibilities. Fiscal devolution can be financially attractive to National governments because by so doing they shift part of their burden of financing services to County governments and private providers.

In the quest to use fiscal devolution as a pathway to poverty eradication, Kenya could borrow a leaf from the South African experience, in which an important feature of public finance in the South African devolved system is the pro-poor budgeting. Pro-poor budgeting is financial planning in a manner that poor people are poised to benefit in absolute terms, as reflected in some agreed measure of poverty such as the headcount index. Pro-poor budgeting on the expenditure side is used to address social inequalities and inequities at all levels of government to enhance effective redistribution. The rationale here is that if public goods and services are available to all citizens, then people with no income can consume as much as anyone else. The reasoning here is that if essential goods and services become increasingly available to the poor, not only is their state of relative poverty lessened but so is their inequality in relation to others who already have access to these goods and services. An example would be where a newly opened public clinic makes it possible for a previously vulnerable poor child to be immunised against a disease, then, in relation to that disease, the child would be fully equal to all other vaccinated children, rich or

63 As above.

poor. Furthermore, the child's life expectancy would be prolonged, closing another gap relative to wealthier children.

5.4 GOOD GOVERNANCE AND DEVOLVED GOVERNMENT

Governance refers to the complex mechanisms and processes used in implementing policy and institutionalising rules and norms within any organisation, institution or society.⁶⁴ It involves a combined effort and participation of all stakeholders including state institutions and civil society. Existing literature views good governance as a government's responsiveness to the needs and wishes of citizens for example, bringing the responsibility for providing public services closer to citizens.⁶⁵ A former UN Secretary General has referred to good governance as a *sine qua non* for economic and social development.⁶⁶ Further, that it is perhaps the single most important factor in eradicating poverty and promoting development. Good governance entails the existence of efficient and accountable institutions. According to this view, governance has to do with the manner in which responsibilities are devolved to government bodies.⁶⁷ At all levels, governments must take responsibility and be accountable. In the context of Kenya's devolved system of government, this means that the National government must enable the County governments to fulfil these obligations.

The principles of good governance require government institutions to be efficient, effective and consistent. This approach is closely connected to the concepts of transparency, integrity and policy coherence. Good governance mechanisms and rules aim at promoting development, protecting human rights, guiding the respect for the rule of law and accommodating all stakeholders including people to participate in decision-making processes that affect their lives. In theory, the reduction of poverty is more likely to be assured when the people for whom pro-poor interventions are meant are allowed, through empowerment, to effectively

64 As above.

65 As above.

66 As above.

67 As above.

participate in these interventions.⁶⁸ Therefore devolved government is assumed to facilitate redistribution and poverty alleviation since it brings greater local level control over resources and their utilisation. However, good governance requires institutional capacity and mechanisms to ensure accountability through the capacity to monitor and enforce rules and to regulate societal activities in the public interest.

Such requirements involve assigning responsibilities to other state institutions in controlling and verifying that government decisions are formulated and implemented in line with its legal commitments. These institutions will have to include an integrated public sector and relevant administrative legislation, efficient parliamentary oversight, an independent judiciary system and an adequate and independent auditing body. Under a devolved fiscal system, good governance ought to ensure that public resources are effectively and efficiently managed. Additionally, it must ensure effective and sustainable resource mobilisation and its efficient use. In this regard, government and public institutions must ensure greater transparency, predictability, and accountability in the decision-making process. They must provide reliable, relevant and timely information about their activities.

5.5 THE PROMISES OF DEVOLVED GOVERNMENT: ENHANCED PUBLIC SERVICE DELIVERY?

The success of a devolved system of government goes beyond its architecture and design as outlined in the Constitution and Legislative Acts. In fact there is no automatic assurance that a devolved system of government, no matter how well designed, will lead to improvements in public service delivery.⁶⁹ Where institutional and technical capacity is lacking at the county or local level to deliver even the most basic services coupled with difficulties that local political elites may pose, public service delivery may be dismal if not non-existent. Secondly, even with a plausible pro-poor budgeting scheme in place, the National government may be risk-taking on the macro-economic level and thereby increasing its vulnerability to

68 As above.

69 Boko (n 1 above).

financial deficit and an over-expansion of its public sector.⁷⁰ Other problematic issues relating to devolved governance are agreement on a universal quality standard of service provision, which would then enable adequate financial planning for mechanisms like financial equalisation.⁷¹ Finally, where national resources are inadequate, to ensure efficiency, coverage and quality of public service delivery, the efficacy of the devolved system is likely to be hampered despite the fact that financial responsibility for service provision has been delegated from National to County governments. This evidence suggests that the National government's challenge is to identify the conditions in which increased participation by County governments enhances the equity, quality and efficiency. Robinson has pointed out the following leading requirements for the success of a devolved system of governance in addition to its design:

- a) Political commitment, for the reason that successful pro-poor devolved service delivery is associated with governing parties that are politically committed to providing opportunities to the poor;
- b) Effective leadership plays a role in fostering local innovation in response to local needs and priorities;
- c) Mobilisation (of political parties, civil society organisations, trade unions and social movements) is essential, in order to take advantage of increased powers and resources, to take part in consultative arenas and to engage in public protest over inadequate service delivery;
- d) Institutionalised participation in decision-making, through consultative bodies designed to provide civic oversight over particular services, facilitating and widening public deliberation, planning and implementation;
- e) Adequate national resources are critical to ensure the equity, quality and efficiency of public services. Inadequate resources often result in poor service outcomes no matter the beauty of design and political commitment;
- f) Technical and managerial capacity is a key determinant of the performance of local officials in relation to service delivery. In other words, the County Governments must

70 As above.

71 As above.

be capable of optimising the use of available resources. This also assumes well functioning mechanisms with which the community can voice demands, channels through which authorities can translate these demands into action and instruments of government accountability.

5.6 DEVOLVED GOVERNMENT: BRINGING GOVERNANCE CLOSER TO THE PEOPLE THROUGH CITIZEN PARTICIPATION

One of the banners under which devolved government was campaigned for, was that it would bring governance closer to the citizenry. The first way in which a devolved system of government does this is by the election of local governments by citizenry. However, fiscal devolution may pose a particular challenge for citizen participation in local governance in view of its technical complexity and critical significance for the delivery of public services.⁷² Participation in this area of devolved governance is likely to be restricted to select groups and individuals with the technical knowhow and would therefore tend to exclude the vast majority of ordinary citizens who pay taxes and consume services provided by local governments. Therefore, fiscal devolution ought to be perceived in its broadest sense as a process which is expected to enhance the opportunities for citizen participation as plainly bringing the decision-making processes closer to people. In so doing, it is then an important step towards creating an environment with opportunities for regular interactions between citizens and county levels of government. Robinson has suggested that despite its complexity, citizens and civil society can participate in fiscal devolution through:

- a) the rules and formulae governing the allocation of grants and revenue-raising powers to local governments;
- b) the decision-making processes concerning the sources and level of locally generated revenues;
- c) the allocation, utilisation and monitoring of earmarked financial transfers;
- d) decisions on the allocation of untied funds and locally generated resources;

72 As above.

- e) Resources allocated for supporting participatory processes in local governance activities, i.e. capacity-building for civil society and local government actors in participatory techniques.⁷³

5.7 DEVOLVED GOVERNMENT AND AFFIRMATIVE ACTION

Affirmative action is a deliberate policy or programme that is a deliberate policy or programme that seeks to remedy past discrimination by increasing the chances of the affected to participate in what they were previously denied. The object of affirmative action otherwise known as positive discrimination is to enhance the participation of marginalised groups in decision making and implementation and make a difference in the political climate and culture.⁷⁴ The protection of rights for minorities and marginalised groups is classically provided for under the Bill of Rights. However, the Bill of Rights of itself is inadequate because experience has shown that its efficiency depends on access to courts and capacity of the judiciary to give redress.⁷⁵ That many questions relating to the Bill of Rights border on politics, their justiciability is more often than not impugned. The reasonable implication of this reality is that the Bill of Rights of itself need to be complemented by other devices such as is done by the concept of affirmative action.

The system of devolved government created under Chapter Eleven of the constitution, acknowledges and employs the principle of affirmative action. The chapter makes references to considerations based on gender, minorities and marginalised communities in its provisions. It may be strongly argued from the foregoing that women and ethnic minorities are implicitly considered as special groups in need of constitutional protection and affirmative action.⁷⁶ Indeed a central theme of devolution is the protection of minorities and marginalised groups. Some of the provisions that seek to foster and promote affirmative action include article 175(c), which requires that no more than two-thirds of the members of representative

73 As above.

74 As above.

75 As above.

76 As above.

bodies in each county government shall be of the same gender. This is bolstered by Article 177(1)(c) through which the membership of the devolved units (county assemblies) must comprise of the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament.

6 A LEGISLATIVE FRAMEWORK AND PROPOSALS FOR INCORPORATION IN THE DEVOLVED GOVERNMENT STATUTE

Article 200 of the Constitution envisages the enactment of legislation by Parliament to give effect to the system of devolved government created. The chapter on devolved government is basically the foundation of a much more complex structure that is to be erected in more detail by the legislation envisaged under Article 200. Given the skeletal nature of the provisions in the Constitution, this article cannot at the time generate fairly comprehensive model Devolution Act. However, in the following segment, the key issues that ought not to go overlooked in the drafting of the Act are outlined.

7 CONCLUSION

The Devolved Government Act which is set to be enacted should contain a preamble broadly setting out the principles and objectives of devolution expounding or explicating the general principles of devolved government under Articles 174 and 175 of the Constitution. The preamble should also set out the vision and aspirations of the people in creating a devolved government and in particular recognise the sovereignty of the people as the basis for devolution of state powers. The preliminary part should provide for the short title of the legislation on devolution and a concise section on interpretation to define the meaning of the key words and phrases used in the Act. The section on interpretation ought to be thorough so as to avoid ambiguities that would see the provisions subjected to numerous court cases for clarification. The part on the County governments should comprise of articles or chapters on the County Executive Committees and County Assemblies. This chapter should designate the person(s) and title/name of the authority in whom executive power of the regional government is vested in. For purposes of this

section we shall suppose such person or authority shall be known as the Regional County Executive (RCE).

This chapter should provide for ways or methods of appointing or electing the RCE, his terms of office and the qualification and condition for holding the said office. Provision for the powers, functions and privileges of the RCE should be made including the oath or affirmation the RCE must make or subscribe before entering upon his office. There should be provision for a Council of Ministers to aid and advise the RCE and setting out its powers, functions and privileges. The modalities for the appointment or election of the Council of Ministers should be stipulated. It is prudent to make provision for appointment of an Auditor-General for the Region to advise the regional government on legal matters.

This chapter should provide for the composition of the legislature and state whether the RCE will be a member, and if so, how he will relate to the legislature. The number of members of the regional legislatures should be stipulated. Provision on how the regional legislatures will discharge the functions and powers specified in the Constitution should be made. The chapter should contain provision for duration of regional legislatures and the qualification for membership. Provisions on when and by whom the regional legislatures shall be summoned should be made including provisions on prorogation and dissolution of the regional legislatures. Provision should also be made on whether the RCEs will have the right to address the regional legislatures and send messages with respect to a Bill then pending in the legislature or otherwise. The chapter should make provisions for the appointment or election, of the Speakers and Deputy Speakers of the regional legislatures. Their powers and privileges should be provided for. It should be provided how the Speaker or Deputy Speaker may vacate his office, resign or be removed. Provision should be made for other staff of the regional legislatures. The chapter should make provision for how the regional legislatures shall conduct their business and provide for the powers, privileges and immunities of regional legislatures and their members. The provisions on a devolved system of government under the Constitution of Kenya 2010 are well thought out and provide a sound foundation upon which a more comprehensive

piece of legislation may be enacted. Save for the issues surrounding the Revenue Allocation Commission, namely its composition, it is a promising institution.

CHAPTER EIGHT

CONSTITUTIONAL REGULATION OF INTERNATIONAL LAW IN KENYA

LUIS G FRANCESCHI*

1 INTRODUCTION

Ernst Hirsch Ballin¹ argues that the constitutive elements of states are usually listed as a territory with borders, a people and the effective exercise of authority. He says that long before political unity can be established there must be a core element which can define that identity. Certainly, the story is different in Africa. States were forced down Africa's thought and way of life. Boundaries were drawn in total disregard of ethnicity, desires and the unwritten millenary history of the people. In fact, in East Africa alone, people from all countries experience, even today, the drama of having been split by foreign powers in a race to ransack a continent before and after the World Wars.² The effects are still evident and it is perhaps too late to mend. The fact is that there are many nations within each country and those nations often spill over into other countries.

This scenario has triggered insurmountable obstacles for the attainment of national identity and a true democratic process. Constitutions have been drawn, legal structures created and

* Luis G. Franceschi holds an LL.B. (U.C.A.B.), LL.M. (University of Nairobi) and is currently a LLD Candidate at the University of Navarre, Spain. He is Chairman of the Scientific Committee of the Annual Ethics Conferences since 2004, Chairman of Imara Educational Foundation, Legal Advisor of Strathmore Educational Trust and Lecturer at Strathmore Business School.

1 See E H Ballin in L Pranke & C Kortmann (eds.) *Constitutional Law of 15 EU Member States* (2004) 481.

2 For example, the colonial boundaries partitioned the Maasai and Dholuo between Kenya and Tanzania, the Luhya, Dholuo and Teso between Uganda and Kenya, the Somali people between Kenya and Somalia and so on and so forth. The division was so arbitrary that, for example, the former Vice-President of Kenya, H.E. Moody Awori had a brother who was a Minister in the Cabinet of the Ugandan Government of President Museveni, for in spite of being from the same family, one was registered as Kenyan while the other Ugandan.

international organs established with little connection to reality. Their motivation seems, on the one hand, to secure the perpetuation in power of certain elites or ethnic groups, and on the other, to please foreign donors. These donors tend to peg financial aid to the application of Western categories in a different and often disjointed African political, legal and economic reality. This drama has reflected itself in the ways and means African states have regulated their foreign affairs. We find in Africa beautiful Constitutions, excellently written laws, innovative jurisprudence and among the most extraordinary legal minds of the modern world. Nevertheless, in many instances, this has been jeopardised by a deficient political will of an inadequate political class.

This chapter deals with the foreign affairs power and its constitutional regulation. It aims at helping the reader understand how international law relates to constitutional law. In the final section we briefly analyse the regulation of the foreign affairs power in some African Constitutions and make a special reference to the Constitution of Kenya, which suffered a metamorphosis between its first stages as a harmonised draft³ and the final document voted at the 4th August 2010 referendum. Such a dramatic change leads us to conclude that from a constitutional law point of view the harmonised draft and the Constitution Kenyans voted in the referendum of 4 August 2010 were two different documents.⁴

2 CONSTITUTIONALISM AND LIMITATION OF POWERS

Constitutional government—in modern constitutional systems—has come to suggest limited government. In fact, Constitutions have become a blueprint for a system of government.⁵ They share

3 See The Constitution of Kenya promulgated on the 27th day of August, 2011.

4 There are three key areas that define the theoretical essence of a constitution. These are the Bill of Rights, the system of governance and the process for domestication of international law. These three elements define which type of constitution we are adopting as a country. Certainly, the Harmonized Draft published in November 2009 was, in this sense, radically different from the final Constitution promulgated in August 2010. The first drafts were founded upon a different system of governance with greater parliamentary controls, a more limited Bill of Rights and a dualist system for domestication of international laws and agreements. The new Constitution is essentially presidential, extremely wide in its rights and absolutely monist.

5 H Louis *Foreign Affairs and the Constitution* (1972) 3.

out authority among a set of different branches and limitations are implied, or should be implied, in these divisions. Constitutions should lay the foundation for external checks, as such checks are designed, at least in part, to safeguard the people's liberties⁶ which is an essential feature of any democratic system.⁷ All governments have Constitutions but the possession and publication of a Constitution does not necessarily make a government constitutional. In modern times, Constitutional government is in fact comprised of the following elements:⁸

- i) Procedural stability: Certain fundamental procedures must not be subject to frequent or arbitrary change;
- ii) Accountability: In a constitutional government, those who govern must be accountable to at least a portion of the governed. This accountability may be achieved through different means: elections, referenda, disciplinary measures, etc.;
- iii) Representation: Those who are called or elected to office are representative of their electors;
- iv) Division of power: Constitutional government requires a division of power among several organs of the body politic.⁹ By dividing power between the legislature, executive, and judiciary, the presence of restraints and 'checks and balances' in the political system is ensured. In

6 As above.

7 This definition of roles may be express or tacit. When tacit, they are referred to as 'constitutional abeyances'. Constitutional abeyances refer to those parts of a Constitution that remain unwritten and/or unspoken, not only by convention, but also out of necessity or convenience. They are half-answers or partial truths. They create and at times are at the core of constitutional crises because by their very nature they condone, and even cultivate, constitutional ambiguity as an acceptable strategy for resolving conflicts. As 'abeyances refer to those constitutional gaps which remain vacuum for positive and constructive purposes' depending on the nature and extent of constitutional abeyances, the executive will be more or less limited in its action, but in principle, the interpretation of a constitutional abeyance occurring on any external check and balance should be restrictive and limited in order to avoid an absolute accumulation of powers in the same hands which implies tyranny.' See M Foley *The silence of the constitutions* (1989) 2-3.

8 See 'Government' in *Encyclopedia Britannica Multimedia Edition* (1998).

9 Pre-constitutional governments, such as the absolute monarchies of Europe in the 18th century, frequently concentrated all power in the hands of a single person. The same has been true in modern dictatorships such as Hitler's in Germany. See *Encyclopedia Britannica* (n 8 above).

this way citizens are able to influence policy by accessing any other branch of government; and

- v) Openness and disclosure: Democracy rests upon popular participation in government, constitutionalism upon disclosure of and openness about the affairs of government. In this sense, constitutionalism is a prerequisite of successful democracy, since the people cannot participate rationally in government unless they are adequately informed of its workings.

The difficult balance between the obligation to meet these requirements and the imperative need for an expeditious and efficient government may be achieved with difficulty. That is why, international policy, relations and the power to put these into motion is necessary in all aspects of governance.

3 INTERNATIONAL POLICY, INTERNATIONAL RELATIONS AND THE FOREIGN AFFAIRS POWER

Constitutional law has an immense impact on the international legal order. This is so, due to the paramount influence of each constitutional system in the relationship between foreign policy, international law and diplomacy. This correlation according to Tunkin has three aspects:

- a) The influence of foreign policy upon the development of international law;
- b) The converse influence of international law upon the foreign policy of a state; and
- c) The use of international law by states as a support for foreign policy.¹⁰

One of the main aspects of a country where democracy must be present is in its international policy. This is because today, international policy affects and somehow dictates the future of the state and its citizens. International policy refers to the course of action or decisions desired and taken by a section of the government of a state in pursuit and promotion of national interests in the international

10 G I Tunkin *Teoriia Mezhdunarodnogo Prava* (Translated by E B William as *Theory of International Law*) (1974) 271.

systems.¹¹ Such policies direct relations and in the international scenario, the relations become operational through the exercise of the foreign affairs power.

'Foreign affairs' is a wide term which expresses more than mere relations. Affairs include 'matters' and 'things' as well as relationships and a constitutional grant of plenary legitimate power.¹² It means that foreign affairs are matters relating to foreign countries, i.e. affairs other than domestic and specifically, matters having to do with the interests of the home country in foreign countries.¹³ In this context, foreign affairs may be identified as a function. A function is an activity 'specially fitted for', 'appropriate to' or 'expected of' something because of its peculiar nature, attributes, or qualifications. The foreign affairs function, thus, Bonfield says, may be an activity specially fitted for, appropriate to, or expected of international relations—the interests of a state in foreign states—due to the peculiar nature or attributes of such relations. In addition, power may be defined as the competence to decide and act on a specific function.¹⁴

As each of these aspects evolves, and the states find the need to implement their foreign policy, the elements of the foreign affairs power become visible. Hence, foreign affairs power is the competence to decide and act in matters having to do with the interests of the home state in foreign states. This power consists of four key elements which are the doors that allow a country to relate to the outer world. Those elements are intermingled but for academic purposes have been identified as diplomatic relations, treaty-making, declaration of war/peace and recognition of foreign states and governments. Below is a diagrammatic presentation of how these elements inter-relate.

11 K Orwa *Foreign relations and international co-operation: Kenya Official handbook* (1988).

12 P H Lare *A manual of Australian constitutional law* (4th ed. 1997) 140.

13 See E Bonfield 'Military & Foreign Affairs function rule-making under the APA' (1972) 71/1 *Michigan Law Review* 258.

14 See W Gunter 'Foreign relations and international integration according to the basic law of the Federal Republic of Germany' (1967) 7 *Indian Journal of International Law* 45. See also Arthur Bonfield (n 13 above).



These elements, as we will see later, should ideally count on, at least, a basic constitutional regulation. In one way or another, these elements partly determine the vigour of the activity in a modern state and they are, partly, the international law makers. Thus, four questions immediately arise in connection to the foreign affairs power. First, where does the power originate and who grants it? Second, what is the history behind this power and its application in Kenya? Third, is this power an unlimited power? And fourth, how is it implemented?

3.1 THE ORIGIN OF THE FOREIGN AFFAIRS POWER

The history of the foreign affairs power is the history of each one of its elements. Moreover, there are at least four cardinal historical aspects that have shaped the modern approach towards the exercise

of the foreign affairs power. The first is Grotius' view that the law of nations is neither made nor supported by the power of a sovereign state, but on natural law which he said contains 'dictates of right reason' and which provided usage common to the laws of all nations.¹⁵ The Greek law of nature had given inspiration to the rules of Roman *jus gentium*; and the *jus gentium* thus inspired had given force and practical application to the rule of right reason, on which international law ultimately rests. Certainly, there have been diverging views. Hobbes, for example, argues that individuals organise themselves in order to ensure their self-preservation by giving all powers to a sovereign and any division of these powers would destroy the sovereign. Hobbes therefore prefers to place all powers on one singular sovereign.¹⁶

Locke, on his part, attempted to provide firm assurance of the individual's rights by assigning separate co-ordinated powers to the monarchs and the parliament on the one hand and, on the other, by reserving the right of revolution against a government that had become unconstitutionally oppressive.¹⁷ Rousseau, on the other hand, merged all individual citizens into an all-powerful sovereign whose main purpose was the expression of the general will.¹⁸

The second is the idea of maintaining a balance of power, which will necessarily emerge whenever there are several neighbouring and independent states. In ancient Greece and in medieval Italy, wars and alliances were used to prevent the predominance of some of these states. In the sixteenth century, the influence of this idea was felt throughout Western Europe. The foreign policy of Wolsey was inspired by this idea and the foreign policy of the early part of Elizabeth's reign was determined to a large extent by her knowledge that maintenance of the balance of power would practically compel Spain to take England's side against France.¹⁹ After the French Revolution, the consciousness of the importance of keeping a

15 W S Holdsworth *A history of English law* (1966) 25-60.

16 T Hobbes *Leviathan 1588-1679* edited by M Oakeshott (1962).

17 J Locke *Two tracts on government 1632-1704* edited by P Abrams (1967).

18 J Rousseau *Du Contrat Social 1712-1778* translated and introduced by M Cranston (1968).

19 As above.

balance of power reached the people. The juridical conscience of a free people created new forms of relationship between international law and constitutional law.²⁰

In the *Reparation for Injuries* case, the International Court of Justice (ICJ) remarked that powers expressly granted have been held to imply others.²¹ Henkin, paraphrasing this ICJ decision says, 'Foreign affairs powers expressly granted have been held to imply others: for example, the power to make treaties implies the power to terminate or break them. And some powers taken together have been found to 'result' in others.'²² For example the power to appoint and to receive ambassadors 'results' in the power to conduct diplomatic relations or the power to do other things involved in maintaining relations with a foreign country. Foreign affairs powers have also been spawned from general grants, for example, the provision vesting 'the executive power' in the President.²³ Nevertheless, for any implication of powers there must be a first principle or general power granted, so that others may be implied.²⁴ The question then arises: Where is this first principle so that other powers may be implied? The first logical answer would be 'in the Constitution.' However, some authors²⁵ go further and see foreign affair powers as extra-constitutional or pre-constitutional as they belong to the nature itself of a state and the state cannot do without them.

The third is related to the increase of permanent and peaceful relations between states, the growth of permanent machinery for

20 See B Mirkine-Guetzevitch 'La Méthode Historique de l'étude des Rapports entre le Droit International et Droit Constitutionnel' (1998) 38 *Recueil des Cours Académie de Droit International* 311-463.

21 The 'Reparation for injuries suffered in the service of the United Nations case' (1849) *ICJ Reports* 179-186.

22 Louis (n 5 above) 17.

23 As was the case of s 23(1) of the Kenya Constitution (repealed) as amended in October 1997.

24 See (n 7 above). An abeyance may be desirable when the Constitution has established the power but not all the circumstances for it to be carried out, leaving thus a range of freedom for decisions. Nevertheless we see abeyance as an inconvenient solution when the ambiguity refers to the power itself.

25 For example, Henkin argues that foreign affairs powers are extra-constitutional; Gunter Wirzsch says they belong to the executive by nature; Bloom bases them on sovereignty, and classical authors, such as Hobbes, Locke, Montesquieu and more recently Grotius.

discussion of their differences and the consequent evolution of legal rules as to the working of this machinery and as to the principles applicable to settle these differences. The importance of the law, which regulated peaceful relations among states, was as great as the importance of the law, which regulated their relations in time of war. The fourth is the growth of foreign trade, which gave rise to various questions of co-operation and a fresh idea of international relations as a means of advancement and material welfare.

These ideas may be fused into one which is found at the core of them all. The power remains in the people and through the people it is laid in the Constitution and subsequently vested, by the Constitution, in different structures or even supra-national structures. This is because though the individual states are sovereign and independent of each other, and there is no international convention above them, there exists a powerful unifying factor, that is, common interests.²⁶ The influence of that unifying factor, Green says, is liable to suffer a setback whenever economic nationalism, political intolerance and the pursuit of self-sufficiency on the part of sovereign states tend to create artificial barriers among the peoples comprising them. Whenever that happens, the authority and reality of international law are likely to weaken because this is against the general natural tendencies of development and against the reality of national intercourse between states.²⁷

For example, Gunter asserts, the European Economic Community obliges in certain matters, the member states' citizens and legal persons to certain acts or omissions. They are also able to enforce this obligation by means of the states' authority i.e., they exercise public power. They exercise the power of foreign relations in that they make final and legally binding decisions on certain questions which are otherwise subject solely to the sovereign competence of the state. For example, Germany must obey some economic agreements made by the EEC with third parties whether it concurs with such agreements or not. It is therefore correct to conclude that Germany by joining the EEC has lost part of her

26 L C Green *Law and society* (1975) 12.

27 As above.

foreign affairs power²⁸ or, rather, the people have delegated part of their power to a supra-national organ.

Hence, the foreign affairs power originates from the people and is distributed by the Constitution. It is thus, essential to find appropriate ways of distribution so as not to lose essential identification between the people, the government and the state. In addition, this identification may even achieve levels of international integration and trans-national loyalty if there are clearly recognisable symbols with which identification can take place. These symbols evoke identification by being protective in the face of external threat and being materialistically beneficent. For example, the idea of freedom intermingled with the notion of 'negritude' were once symbols that united Africa²⁹ and fulfilled that role of supranational polity in which identification could take place.³⁰

3.2 INTERPLAY BETWEEN INTERNATIONAL AND DOMESTIC LAW

The rules governing the conclusion of treaties are laid down partly by national Constitutions—varying from one country to another—partly by international customary law, supplemented by the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations.³¹ National Constitutions present two approaches to the conferment of legal character to those treaties requiring internal application:³²

- Parallelism or dualism, a concept of historical reality, is the acknowledgement of the co-existence of the two independent juridical orders, i.e. international and

28 Gunter (n 15 above) 45–50.

29 Markowitz cited by W Bloom 'Personal identity, national identity and international relations' (1990) 9 *Cambridge Studies in International Relations* 151.

30 As above 151.

31 See Paul Reuter, *op. cit.* at 35.

32 Some authors like Boris Mirkine-Guetzevitch speak of a third group called 'Nationalisme constitutionnel', that is, the acknowledgement of the primacy of internal law although this would imply a complete negation of the existence of international law which does not correspond to today's reality.

constitutional. Consequently, agreements need special legislation before they become law of the land.

- Internationalism or monism, initiated by the Austrian school, is the acknowledgement of the primacy of international law and, thus, agreements made under certain conditions automatically become law of the land.³³

In today's most common literature, parallelism is called 'dualism', while internationalism is called 'monism'. The dualist theory perfectly agreed with the international reality before the First World War. However, the radical transformation of international life after the War, the creation of new forms of international law, new juridical realities not foreseen before the War, gave pre-eminence and marked the success of the Austrian school—the monist school—which propounded the primacy of international law.³⁴ It is worth mentioning that the work of Triepel³⁵ enhanced progress in this regard. He asserts that it is necessary to admit the fact that international law and internal law form a logical unity. This leads us to substitute the dualist theory with the monist, which in essence identifies the international legal system with the internal. Another monist, Verdross,³⁶ however, suggests that the choice of primacy rests on juridical logic.³⁷

33 See Mirkine-Guetzevitch (n 20 above) 312.

34 As above 313.

35 M Triepel 'Distinction du Droit Interne et du Droit International' (1998) 1 *Recueil des Cours, Académie de Droit International* 85–87. His legal thought is based on earlier works of Hans Kelsen.

36 Verdross' attempts to depict the main social conditions characteristically begun with a philosophical point of view. Relying on this perspective he wrote: 'on n'arrive pas à comprendre les faits sociaux si l'on ne pénètre pas les pensées qui sont à leur base.' (A Verdross 'Le Fondement Du Droit International' *Recueil Der Cours, Académie de Droit International* 268–270).

37 The essentials of the monist theory can be seen in Kelsen's postulates. He affirms that monism is indispensable and that 'two parallel juridical orders cannot co-exist.' (Hans Kelsen, quoted by Verdross (n 36 above) 270.) This was stated by the International Court of Justice when it said: 'En regard du droit international ... les lois nationales sont des simples faits ... au même titlé que les décisions judiciaires ou les mesures administratives.' (In regard to international laws ... the national laws are simple facts ... with the same value as judicial decisions or administrative measures).

For Kelsen,³⁸ the two systems cannot co-exist in the same political entity.³⁹ A State, under the same circumstances, is either monist or dualist. Nevertheless, the co-existence of both systems in the international order is a historical reality. The fact is that for some states, concluded treaties are considered part of the law of the land (monism)⁴⁰, and for others they are not (dualism).

38 As above.

39 The case of Spain is somewhat peculiar as will be shown later in this chapter.

40 For example, art 2 of the US Constitution states: '...all treaties made or which shall be made, under the authority of the United States, shall be supreme Law of the Land.' However, although they become 'the supreme Law of the Land', some treaties require legislative action before they can receive effect in American courts. In this regard in 1829 in *Foster v. Neilson*, Chief Justice Marshall said: 'Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision [it is then what is known as 'self-executing' treaties]. But when the terms of the stipulation import a contract — when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule of the Court.' In the United Kingdom, with a very limited class of exceptions, no treaty is self-executing; no treaty requiring municipal action to give effect to it can receive that effect without the co-operation of Parliament, either in the form of a statute or in some other way. If it is not already authorised by the existing law of the land, the Crown must induce Parliament to legislate so as to make the necessary change in the law, or equip the Crown with the necessary power to execute the treaty. If Parliament declines to do so, the Crown will not conclude the treaty. If *per incuriam* the Crown has already done so, the United Kingdom is bound by it, for the Crown must do its best to extricate the country from an embarrassing situation. In the case of *Attorney-General for Canada v. Attorney-General for Ontario and others* (1937), the Privy Council held that a treaty comprises any agreement between two or more sovereign states and that (i) 'within the British Empire, there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action.' (ii) 'Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining assent of Parliament to the necessary statute or statutes.' (iii) 'To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it.' (iv) 'It cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone.' (v) 'Once they are created, while they bind the state as against other contracting parties, Parliament may refuse to perform them and so leave the State in default.' See W Geoffrey *Cases and Materials in Constitutional and Administrative Law* (1966) 452-453.

In monist systems treaties become law of the land automatically. However, they are not always self-executing or immediately operative.⁴¹ Monism represents a step forward in the development of binding rules of international law and their enforcement. It is, however, still developing and has found, at times, barriers for its acceptance. For some states monism is believed to fit only cases 'where legal integration is matched by a complete social integration, i.e. where international society is strong enough for more restricted social structures and relationships to converge and harmonise within it. But where international society is practically non-existent and states jealously close themselves to the outside world and keep their foreign relations under strict control, then hardly any international rules will penetrate the municipal shell.'⁴² These prejudices, Reuter continues, are 'a fair reflection of the ideal of a state rejecting legal integration essentially because there is no social integration and no intention of bringing it about.'⁴³

Dualism, on the other hand, is not directly related to the approval the legislature usually grants before ratification, which may also be there in the monist system. Rather, it rests on the requirement of having statutory law being passed by Parliament before giving any legal internal effect to a 'ratified' treaty. This may hamper the fulfilment of international obligations because there is no possibility of giving internal effect to treaties unless they are consistent with existing legislation, or a statute is passed by Parliament.

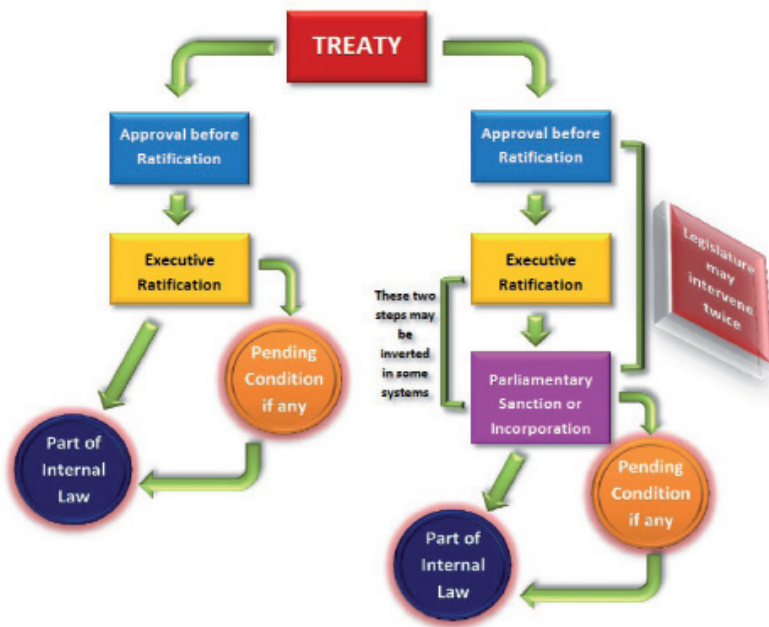
The following chart may help the reader understand how monism and dualism operate in relation to treaties:⁴⁴

41 See *Foster v Neilson* (1829).

42 P Reuter *Introduction to the law of treaties* (1989) 38.

43 As above.

44 It is important to understand that there can be as many designs of systems as countries in the world. We have tried to present in this chart the most common features of systems in operation in the world.



There is no doubt, nevertheless, that either system, monist or dualist, can bring about certain difficulties such as those relating to the supremacy and temporal validity of international law in general and specifically treaties, in reference to municipal law on the one hand, and discrepancies between the national Constitution and the treaty, on the other. These discrepancies need to be addressed country by country.

3.3 THE EXERCISE OF THE FOREIGN AFFAIRS POWER IN KENYA FROM A HISTORICAL PERSPECTIVE

This historical development must be examined from two different angles, i.e. first we will look at the political developments and evolution of the exercise of the foreign affairs; second, we will examine the theoretical foundations for the existence of the foreign affairs power in Kenya from a historical-legal perspective.

3.3.1 POLITICAL-HISTORICAL FOUNDATIONS OF THE FOREIGN AFFAIRS POWER IN KENYA

Kenya is said to be an ethnic and cultural melting pot. Its present population is the result of incursions of differing groups over the past 1500 years. Before 1000 AD, East Africa was invaded by Nilotic clans from the north. The invaders, called Hima, were aristocratic pastoralists who introduced cattle herding and developed powerful kingdoms. Bantu invasions seem to have begun after the 14th century. In the 17th century came the Nilo-Hamitic Maasai clans with their cattle herds, entering Kenya from the region north of Lake Turkana. Like the Bantu, Maasai societies were also based on clans, and although the warrior, or *moran*, was a dominant figure, the Maasai never had large armies.

Back in the 11th century, coastal areas had been dominated by traders and settlers from southern Arabia. They established the various *Zenj* city-states, so called because in Arabic the country was known as the land of the *Zenj*, or 'black people.' The most important of these settlements in Kenya were Malindi and Mombasa. In time a composite Arabic-Bantu culture developed along the coast, exemplified by the hybrid Swahili language, which became the trading language of East Africa. Generally independent from one another, the *Zenj* states were from time to time dominated by powerful non-African maritime empires.

In the early 19th century Sultan Sayyid Said of Oman conquered all the city-states north of Cape Delgado. Ruling over a commercial empire, he did not try to dominate the interior Bantu clans, and he eventually moved his capital to the island of Zanzibar in present-day Tanzania. The clove plantations on Zanzibar and oil-palm groves at Mombasa, developed by Said, required a large labour force, and this need was met by the slave trade. Controlled from Mombasa and Zanzibar, this trade extended into Africa's interior as far as Congo. The cruelty of the slave trade brought revived European interest in Kenya. The British consul in Zanzibar took the lead in the anti-slave-trade movement. In return for guarantees of continued protection, the sultan, by the 1850s, had signed treaties limiting the scope of the trade. Finally, in 1873, fearing that the British would

support a European takeover of his empire, Said's son, Barghash, agreed to abolition.

In 1886 the British recognised the German sphere of influence over coastal Tanganyika (part of present-day Tanzania), retaining the Kenya area for themselves. A further territorial division took place in 1890. For a time British interests in Kenya were maintained by the Imperial British East Africa Company. The failure of this company to fulfill the terms of its charter led the British government to declare protectorate status over East Africa (now Kenya) in 1895. The protectorate form, as applied by the British, offered the constitutional terrain *d'essai*, which allowed flexibility of governmental machinery as expediency dictated.⁴⁵

In 1896 the British Foreign Office assumed direct control primarily because of the decision to build a railway from Mombasa to Lake Victoria. To achieve this goal, the British government put into practice effective measures which included 'military expeditions to pacify hostile tribes between 1901 and 1908, and the conversion of the traditional political systems into chiefly systems, with the chief owing direct allegiance to the government, and serving as the grass-roots link between the central government and the rural populations.'⁴⁶

In 1902 all Kenya became a dependency under the Colonial Office. It became the British base of operations in the protracted East African campaign against the Germans during World War I (1914–1918). Since Kenya was a colony, all matters of foreign affairs could only be conducted in consultation with the Royal ministry of Foreign Affairs in Britain. This would be done through the colonial secretary. In Kenya, tribal lands were guaranteed, but all unoccupied territory became crown land. The government, claiming to be concerned with 'native paramountcy', actually favoured the white minority.

The Kikuyu, never reconciled to the loss of their original lands, began an agitation after World War II (1939–1945), which culminated in the *Mau Mau* Rebellion of the early 1950s. Jomo Kenyatta had

45 J B Ojwang, *Constitutional development in Kenya* (1990) 23.

46 As above 24.

been imprisoned for complicity in the *Mau Mau* uprising and the major Kenya political party, the Kenya African National Union (KANU), refused to co-operate fully until their leader was released. Once this was done in 1961, full cooperation ensured Kenya's independence, which was proclaimed on 12 December 1963.

Despite the fears of white settlers, African rule proved moderate and progressive. Internal peace among the different tribes and nations was maintained, and land redistribution calmed much of the clamour of Kenya's traditional leaders. Kenya became a republic in 1964, and Kenyatta was chosen its first president. He sought to maintain good relations with Kenya's neighbours in accordance with the foreign policy principles found in the KANU Constitution of 1960. In this document independence leaders committed themselves to promote and consolidate 'international peace and the peaceful settlement of international disputes',⁴⁷ and that the KANU government would work together with other African leaders to foster 'unity of action among the people of Africa.'⁴⁸ The 1963 KANU Elections Manifesto outlined the main tenets of what an independent Kenyan foreign policy would be— co-operative relations was preferred to 'aggressive' or 'imperialistic' policies towards neighbours— with the hope that co-operation would enhance regional peace and security. Independent Kenya was also to pursue the policy of non-alignment.⁴⁹

According to Katete Orwa, 'good neighbourliness, pan-Africanism and non-alignment' may summarise Kenya's foreign policy guidelines at independence. By 'non-alignment', Kenya asserted the principle of 'positive independence' which underscored the determination of the country to fully participate in international affairs. Pan-Africanism focussed policy on inter-African affairs with the ultimate goal of promoting African unity. And non-alignment embodied the policy opposed to the division of the world into antagonistic blocs of East and West, of socialists and democratic capitalist. 'This division threatened international peace and security and Kenya rejected it, because Kenya wished to be on the side of

47 Orwa (n 11 above).

48 See KANU Constitution of 1960: 1-2 cited by C N Mwaura in *Emerging trends and prospects for Kenya's foreign policy in the 1990's and beyond* (1997).

49 Orwa (n 11 above).

states—the non-aligned— promoting international peace and serenity.⁵⁰

However, Kenya did have some difficulties with Tanzania, with Ugandan and with the Northern Frontier District Somali separatists.⁵¹ In view of this, in the 1960's, Kenya resorted to conflict to respond to foreign policies of other states. This was the foreign policy basis of the *Shifty* war, which Kenya fought in response to the Somali foreign policy undertaking of creating 'Greater Somalia'.⁵²

50 As above.

51 In 1963, Somali secessionists in the Northern Frontier District boycotted Kenyan Elections. No candidate presented his papers for nomination. (*The Daily Nation* Monday 22 April 1963, 1). Somali secessionists in Kenya's Northern Frontier District gave the British Government 15 days to grant the district the right to Secede from Kenya. 'Otherwise we will declare our own independence in the district', the Northern District People's Progressive Party said in Nairobi. (*The Daily Nation* Tuesday 7 May 1963). Only two months earlier, opposing sectors to the secessionist movement represented by the Northern Province United Association executive officer Osman Oraru, had warned that Ethiopians and Somalis will go to war on Kenya soil if one square inch of the Northern Frontier District is handed over to Somalia by British (*The Daily Nation* Thursday 28 February 1963). And in retaliation, Somalia announced the formation of new emergency military force to counter any attacks and to be used when need arises. This was revealed by Somali Prime Minister in Parliament when discussing on the matter of severing relations with Britain. (*The Daily Nation* 14 March 1963, 1). Eventually, Somalia broke relations with Britain. In an interview with the Nation Newspaper, the Somali Vice Consul in Kenya said that Somalia had broken off diplomatic relations with Britain but not with the Africans of Kenya whom he said 'understood our campaign for self-determination in the Northern Frontier District'. He said that the closing of their offices in Nairobi was done as a matter of procedure. However, KANU Secretary General Tom Mboya said that 'Somalia should start talking to Kenyan leaders and not to Britain which is a foreign power'. (See *The Daily Nation* 19 March 1963, 1). In the late 1980s the tension between Kenya and Uganda increased. In 1987, Kenyans demonstrated in the streets of Nairobi protesting Uganda's interference with Kenyan borders (*The Sunday Nation*, 20 December 20 1987, 1). In 1989, President Moi declared in Nairobi that should Ugandan soldiers cross into Kenya, the country security forces would not only take action but, in accordance with international conventions, pursue them into Uganda (See *The Daily Nation*, Monday 13 March 1989, 1). The President was responding to a series of attacks by Ugandan soldiers who had dropped two bombs in the Lokichogio area of northern Kenya killing three people and a number of livestock. The bomb raid, the second invasion to Kenya by Ugandans in a week, took place when Ugandan planes crossed the common border at Otopoi (*The Daily Nation* Wednesday 8 March 1989, 1). President Moi also warned the Ugandan government that any armed Ugandan trespassing into Kenya would be met with decisive force (*The Daily Nation* Saturday 19 September 1987, 1).

52 M Mwangi 'The diplomacy of conflict management: Conflict and co-operation in Kenya's foreign policy' Paper presented at a special course for journalists on reporting of Foreign Policy of Kenya, USIU Kenya 27-29 August 1997 Kasarani Campus Nairobi.

In 1968 John Howell identified two strands in Kenya's foreign policy, one conservative and the other radical. First 'conservative', where Kenya's objectives revolved around maintaining the required *status quo* of pre-independence which facilitated and enhanced Kenya's predominant role in the region. Second, a 'radical' strand in the internal arena, characterised by non-alignment in international affairs.⁵³

Kenyatta's successor, Daniel arap Moi, followed the same moderate political and economic policies. In the late 1970's and 1980's Kenya's foreign policy was based on Kenya's commitment to multilateral political institutions and their frameworks of operation. In this case, Kenya associated itself with the formal aspects of disowning conflict and the use of force. Kenya's foreign policy pleaded allegiance to the UN and OAU Charters, and respect for international law. Kenya became mediator in the conflicts in Congo and Angola and more recently in South Sudan. From the early 80's to the present, conflict management has become an important and even distinguishing feature of Kenya's foreign policy.⁵⁴ Conflict mediation in neighbouring states has always been at the heart of Kenya as a regional leader.⁵⁵ Meanwhile, internal conflicts increased and in late 1991, President Moi yielded to pressure by legalising opposition parties. Kenya's first multiparty election in 26 years was held in December 1992. In 2002 for the first time Kenya's power has handed over to an opposition government composed of the Rainbow coalition headed by Mwai Kibaki. However, in 2007 elections were marred by violence and ethnic hatred.

Currently, Kenya maintains diplomatic, consular or trade relations with more than one hundred countries.⁵⁶ It is represented in the UNEP and the United Nations Commission for Human Settlement (HABITAT) both based in Nairobi. It is a member of the United Nations Organisation since 16 December 1963, of the

53 Mwaura (n 48 above).

54 Mwagiru (n 52 above).

55 For example: the conflict in 1985, IGAD's mediation of internal conflict in Sudan, the 1997 Congo-Kinshasa conflict, the Somali conflict and the formation of its government, the Southern Sudan conflict, etc.

56 However, the exact number is not available to the public.

Organisation of African Unity, of the Commonwealth and of the non-aligned movement. Kenya maintains her relations with foreign states on the basis of equality and respect for national sovereignty—cultivating friendship with those willing to reciprocate this cordial gesture.⁵⁷

The treaty-making process has also evolved since independence. The first treaties affecting Kenya were those concluded between European States to partition Africa.⁵⁸ In a similar position are to be found treaties concluded by Britain and the local rulers.⁵⁹ However there has been a dispute as to whether agreements between Britain and local rulers are real treaties from the international law perspective. A case in point is the Maasai Agreement of 1901 which has been held not to be a treaty.⁶⁰ However this position is not settled, as the Ankole Agreement (Uganda) which was similar to the Maasai Agreement, was held to be a treaty.⁶¹ However, the binding nature of these treaties will not be subject of this discussion, and suffice it to say that these agreements were entered into by the British Monarch through their representatives on the one hand, and the local Chiefs or Kings on the other.⁶²

Before Kenya gained independence in 1963, the foreign affairs of the colony [as it was called] were exercised by a Governor as a representative of the Queen [Monarch]. As such Britain had entered into treaties with other countries in respect of the Kenya Colony which had not lapsed at independence. The position of those treaties was expressed by the 'Kenya Independence Declaration on Treaties'

57 Orwa (n 11 above).

58 For example, the Anglo-German Agreement of 1886.

59 The Masai Agreement of 1901.

60 *Oil Le Njogo and other v. A. G* 1914 EALR 70.

61 *Daudi Nalibareman and others v. A. G* 1963 EA. 47.

62 Our position in this regard is that they are treaties as far as the community enjoys the required autonomy to enter into treaties with other governments. This is the case, for example, of provincial governments in Argentina where they are allowed to enter into treaties with other governments under specific circumstances. That could have been the case of the Maasai before Kenya became independent. They enjoyed *de facto* autonomy and self-determination and in this case, theirs could have been considered to be a treaty. Nevertheless, once Kenya got independence it would be for the Government of Kenya to continue it or not, but in no case would such decision be left to the Maasai, who had become 'a people of Kenya'.

of 1963 sent to the Secretary General of the United Nations.⁶³ This declaration provided that:

...bilateral treaties were to continue in force for a period of two years from date of independence, and were to be applied on the basis of reciprocity. At the expiry of those two years, the government would consider those treaties which could not be regarded as surviving according to the rules of International Law, to be terminated... Multilateral treaties were to continue in force for two years, the government would indicate to the various depositories the steps it would take with regard to each instrument— either termination of the treaty, confirmation of its succession, or accession to the treaty. During this interim period, third States could, on basis of reciprocity, consider Kenya to be bound by the terms of those treaties.⁶⁴

This declaration clarified the status Kenya wished to accord to treaties concluded by Britain, its former coloniser. The declaration was based on the terms of what is called the ‘Nyerere Doctrine’. This doctrine initially articulated by Tanzania’s first President Julius Nyerere provided as follows:⁶⁵

1. That where international law did not require it, Tanganyika would not be bound by pre-independence agreements which it considered incompatible with the new status and interests.

63 Full text to be found in I Seaton and M Mauti *Tanzania treaty practice* (1973) 48, cited by M Mwagiru and I Hunja ‘Aspects of treaty practice in Kenya’ (1990) 6/2 *Lesotho Law Journal* 2.

64 Mwagiru and Hunja (n 63 above). The declaration expired in December 1965. It was extended for further 2 years and finally expired in 1967.

65 A good example of Nyerere’s doctrine was the case of the Belgium port at Dar es Salaam and Kigoma. In December 1961, the government of Tanganyika granted the Belgian Government a period of two years to hand over the Belgian government-owned port sites at Dar es Salaam and Kigoma, following Tanganyika’s rejection of the 1921 agreement between Britain and Belgium which provided facilities for Belgian traffic through the territories of East Africa. Announcing this in the National Assembly in Dar es Salaam, Premier Julius Nyerere revealed that Tanganyika had declined to enter into an inheritance agreement with Britain taking over all agreements made by Britain on Tanganyika’s behalf while Britain was the administering authority. All these treaties are to be the subject of separate treaties. Mr. Nyerere said that Tanganyika did not recognize the 1921 agreement between Britain and Belgium regarding the movement of goods through the territory from Dar es Salaam and Kigoma to the Congo and Rwanda Burundi. ‘When they made the treaty, Britain should have known that Tanganyika was not a territory under its full sovereignty,’ Nyerere said. (*The Daily Nation* Friday 1 December 1961, 1)

2. Tanganyika would not sign a devolution agreement,⁶⁶ because in doing so it might enable third states to require her to perform obligations from which she would otherwise have been released by her emergence into statehood. Conversely, an inheritance agreement may not, by itself, enable Tanganyika to insist that third states discharge obligations assumed under a pre-independence treaty...
3. With regard to bilateral agreements, Tanganyika would on a basis of reciprocity, continue in force for two years from Independence Day all valid bilateral treaties which would otherwise have ended with independence. Thereafter such agreements would be negotiated in a mutually acceptable way.
4. With regard to multilateral treaties, Tanganyika was prepared on the basis of reciprocity to treat such instruments as being in force vis-à-vis other states which relied on them in their relations with Tanganyika.⁶⁷

From the foregoing, it is evident that Kenya's declaration to the United Nations Secretary General was based on the Nyerere Doctrine. After independence, Kenya re-negotiated all commercial treaties concluded with communist countries and terminated by notice all other commercial treaties. Kenya also decided to retain all extradition judicial assistance treaties and double assistance treaties. However, it abrogated all treaties with South Africa and Portugal.⁶⁸

3.3.2 LEGAL-HISTORICAL FOUNDATIONS FOR THE FOREIGN AFFAIRS POWER IN KENYA

In the development of the modern approach towards the exercise of the foreign affairs power, Britain played a paramount role as one of the leading powers of the world and head of the biggest empire ever known to history. And in this sense it affected the history

66 Newly independent states had to address the issue of pre-independence treaties. Some countries chose to sign devolution agreements with the United Kingdom. By such agreements, the new government would bind itself to all the obligations (or some) and to inherit all the rights (or some) of the preceding colonial power. Others chose to continue the agreements without devolution. Others chose the evolutionary or eclectic approach by which the new state would choose those agreements to be continued, or reject those repugnant to or inconsistent with their sovereignty. For an in-depth view on these different approaches see Mwangi & Hunja (n 63 above) 10.

67 As above 11.

68 As above 12.

and development of the foreign affairs power in Kenya, a colony of Britain until 1 June 1963. It could be stated that the history of England and of Kenya meet at a specific point in time— 1895, with the declaration by the British government of protectorate status over East Africa (now Kenya).⁶⁹

Kenya did not first interest Britain, except for the grounds of its strategic location as a corridor to Uganda, as the backyard of the Sultan's territory, and its potential suitability for white settlement.⁷⁰ Nevertheless, due to a series of historical facts and developments⁷¹ these strategic interests turned into political concerns which led to the establishment in 1905 of the Legislative Council, which Ojwang qualifies as the 'embryonic parliament.'⁷² The Council performed an important role in the colonial era (1905–1963) between the Western philosophy of the white Dominion⁷³ and the mechanisms of colonial administration. This 'dictated the course of political and constitutional development' in Kenya.⁷⁴

This development reached its culmination with the adoption of the independence Constitution originally drawn at Lancaster House, London. This Constitution inherited the British concept of royal prerogative as the motive force of the executive power. Sir William Holdsworth, in his *History of English Law*,⁷⁵ states that 'the powers of the Crown in relation to foreign affairs have connections

69 For a time British interests in Kenya were maintained by the Imperial British East Africa Company, but in 1896 the British Foreign Office assumed direct control primarily because of the decision to build a railway from Mombasa to Lake Victoria. In 1902 all Kenya became a dependency under the Colonial Office.

70 Ojwang (n 45 above) 23.

71 Mainly the population growth of white settlers, the possibilities for British strategic expansion, and the fertility of land.

72 Ojwang (n 45 above) 25.

73 The word 'dominion' was understood in two different senses: it was in the king's title, e.g. Edward VII was described as 'Edward of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King.' Dominion also meant 'self-governing' territories as the 'Dominion of Canada' or the 'Dominion of New Zealand.' Although the word could be used in both cases, i.e. non-self-governing and self-governing territories, in the Kenya case it would be understood as a non-self-governing territory. See K C Wheare *The constitutional structure of the commonwealth* (1969) 6.

74 Ojwang (n 45 above) 24.

75 Holdsworth (n 15 above) 368.

both with constitutional law and with international law; for they come at the meeting place of these two branches of law.'

The foreign affairs power is considered to be, in English constitutional history, a 'royal prerogative'⁷⁶ for 'with regard to foreign concerns the King is the delegate and representative of his people' and 'what is done by the royal authority, with regard to foreign powers, is the act of the whole nation.'⁷⁷

The royal prerogative is seen as the oldest part of the English Constitution. Sir William Blackstone states that by royal prerogative 'we usually understand that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary cause of the common law, in right of his regal dignity.' The etymological meaning of prerogative (from the Latin *præ* and *rogo*) refers to something that is required or demanded before, or in preference to all others.⁷⁸

Prerogative, accordingly, can only be applied in relation to those rights which the king enjoys exclusively, and not those he enjoys with any of his subjects.⁷⁹ Based on this assertion, Finch, in the early 17th century, laid down a maxim, 'that prerogative is that law in case of the king, which is law in no case of the subject'⁸⁰ and, therefore, were any 'prerogative' to be held in common with any subject, it would cease to be a prerogative.

According to Blackstone, prerogatives could be classified into two— direct and incidental. Direct prerogatives would conform to a positive, substantial part of the kingship and kingly authority. They are rooted in the king's political person, on the account of the mere fact of being the king, and without reference to any other extrinsic circumstance. Examples of direct prerogatives are the right of sending

76 The concept of royal prerogative developed from the medieval *praerogativa regis*.

77 W Blackstone *Commentaries on the laws of England* (1765) (Reprinted in 1966) 232. See also Holdsworth (n 15 above) 368.

78 Blackstone (n 77 above).

79 As above.

80 Finch cited by Blackstone (n 77 above).

ambassadors, of creating peers,⁸¹ of making war and peace, etc. They are inherent in the royal capacity, which is distinct, superior, and above those of any other subject and, by them, the king is invested with sovereignty.⁸² In this regard, Bracton says, '*Rex est vicarius ... et minister Dei in terra: omnis quidem sub eo est, et ipse sub nullo, nisi tantum sub Deo.*'⁸³

Incidental prerogatives are, instead, exceptions by nature. They bear always a relation to something else, different from the king's person; they are exceptions in favour of the Crown, to the general rules established for the general community, such as: no costs shall be recovered against the king, the king can never be a joint-tenant, his debts shall not be preferred before a debt to any of his subjects, etc.⁸⁴ Bracton, who wrote during the times of Henry III, said that the king should not be subject to man but to God and the Law; for it is God and the Law itself that make the king, and he would not be truly a king were he to rule at his own pleasure and not according to the law.⁸⁵ However, since time immemorial, these prerogatives have not been understood as an absolute and discretionary power to

81 When the first English revolution was ended by the restoration of Charles II, in 1660, nineteen peerages were created and added to the respective peerage rolls. These were, in the English Peerage, the Dukedom of Gloucester, 1659, the Earldom of Rochester, 1652, the Viscounty of Mordaunt of Avalon, 1659, and the Baronies of Berkeley of Stratton, 1658, Crofts of Saxham, 1658, Langdale of Holme, 1658, and Wotton, 1650; in the Scottish Peerage, the Earldoms of Balcarres, 1651, and Ormond, 1651, the Viscounties of Oxfuird, 1651, and Kingston, 1651, and the Baronies of Colvill of Ochiltree, 1651, Duffus, 1650, Rollo of Duncrub, 1651 and Ruthven of Freeland, 1651; and, in the Irish Peerage, the Earldoms of Inchiquin, 1654, Clancarty, 1658, and Ulster, 1659, and the Viscounty of Tara, 1650. Also James II created the Seven Irish Peerages between March and August 1689 during which period James was both *de jure* and *de facto* ruler, but despite the fact that the creation of these peerages conformed in every respect with the law, the new government never acknowledged them. (A complete record of these creations may be found in M Ruvigny *The Jacobite Peerage* (1912).

82 See Blackstone (n 77 above) 233.

83 'The King is a vicar ... a minister of God on earth: all are subject to him and he is subject to none but God.' (Translation by the writer of this Chapter.) Bracton cited by Blackstone (n 77 above) 237.

84 See Blackstone (n 77 above) 234.

85 As above 227.

do wrong to any subject.⁸⁶ The king should not ever exceed them without either the consent of the people, or by violating that original contract between the prince and his subjects.⁸⁷ The principal duty of the king, Blackstone says, 'is to govern his people according to law. *Nec regibus infinita aut libera potestas*, was the constitution of ... [the] German ancestors on the continent.'⁸⁸

The king, as the delegate or representative of his people, would be considered to have the sole power with regard to foreign affairs.⁸⁹ First, the King alone would send and receive ambassadors. Ambassadors' rights, powers, duties and privileges would not be determined by any municipal constitution because they represent the persons of their respective masters, who owe no subjection to any laws but those of their own country.⁹⁰ Secondly, the King had the sole power of making treaties, although English constitutional law already established some limitation.⁹¹ In the third place, the King had the sole power of making peace and war.⁹²

Abuses on the exercise of royal prerogatives led to the erosion of the prerogative powers. It was a slow process which began with

86 The limitation of the royal authority, explains Blackstone, was an essential principle in all the Gothic systems of government established in Europe. Although it was gradually driven out by violence in most of the kingdoms of the continent. Bracton summarises this principle with a maxim: '*nihil enim aliud potest rex, nisi id solum quod de jure potest.*'

87 See Blackstone (n 77 above) 230

88 As above 226. The latin text '*Nec Regibus infinita aut libera potestas*' stands for 'Not even kings have infinite and free power.' (translation by the author of this chapter).

89 'In the king ... as in a centre, all the rays of his people are united, and form by that union a consistency, splendor, and power, that make him feared and respected by foreign potentates; who would scruple to enter into any engagements, that must afterwards be revised and ratified by a popular assembly. What is done by the royal authority with regard to foreign powers, is the act of the whole nation.' Blackstone (n 77 above) 245.

90 As above 246. Blackstone explains extensively the whole issue about criminal and civil suits of ambassadors.

91 See, for example, Holdsworth (n 15 above) 253 & 258.

92 While this was the situation in Britain, America was shaping a new concept after independence. James Wilson and James Madison did not consider the prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of those prerogatives— they thought— were of a Legislative nature, specifically that of war and peace. See A Bestor 'Advice from the very beginning, 'consent' when the end is achieved' (1989) 83 *American Journal of International Law* 721.

the Common Law courts⁹³ and resulted in the fact that currently most prerogatives are either regulated by statute⁹⁴ or have their exercise controlled by the Courts or by conventions.⁹⁵ According to Markesinis, prerogatives may be defined in our time as ‘the residue of executive powers, immunities or other attributes which the government possesses without the authority of an Act of Parliament, but which can be withdrawn— expressly or impliedly— by Parliament.’⁹⁶

The institution of the presidency in Kenya may not have inherited, under the 1964 Constitution, the foreign affairs power from the British Crown but from the common law tradition. It may be argued that had the foreign affairs power been received from the British Crown, it would have been expressly established and limited accordingly⁹⁷ because those constitutional limits had already

93 In the *Case of Proclamations* (1611) it was stated that ‘the King hath no prerogative, but that which the law of the land allows him.’

94 See B S Markesinis *The Royal Prerogative re-visited* (1973) 32/2 *Cambridge Law Journal* 288.

95 Yardley argues that Royal Prerogatives are most important in the field of foreign affairs for they can be exercised without parliamentary approval unless rights of citizens are affected or the expenditure of public money is required. In any case, Yardley asserts ‘since the Bill of Rights, 1688, there is little doubt that such Prerogatives as remain to the Crown exist by tacit permission of Parliament.’ Yardley adds that ‘so long as Parliament continues to allow the Monarch or the Crown to retain any Prerogatives, then those Prerogatives will be pre-eminent, but they could always be swept away by Act of Parliament.’ See D C M Yardley *Introduction to British Constitutional Law* (1978) 48.

96 Markesinis (n 94 above) 309.

97 See *Nyali v. The Attorney-General*, 1 Q. B. (1956) where the scope of the royal prerogatives is discussed. Nyali Ltd. built a bridge linking the mainland at Nyali with the island of Mombasa, both in the Protectorate of Kenya, though under the sovereignty of the Sultan of Zanzibar. British military personnel on leave and their families often crossed the bridge. Until 1948 the army authorities agreed to pay certain tolls but from 1948 onwards they ceased payment. In this case the Crown contended that the permission to charge tolls was given in the exercise of the Crown’s prerogative right to grant a franchise of pontage and that the Crown’s servants were exempted from such tolls. The protectorate’s position, on the other hand, was that the territory in question, together with the other dominions of the Sultan, became in 1890, a protectorate. It was argued, however, that the prerogative does not run in Kenya Protectorate, first because the sovereignty of the territory was still in the Sultan of Zanzibar and, secondly, because in any event, the local law did not incorporate the common law in so far as such prerogative rights are concerned. .

been developed by the time of Kenya's independence⁹⁸ and by 1963 the royal prerogative was quite limited.⁹⁹ Therefore, whenever the exercise of the foreign affairs power is considered to be a prerogative of the executive, it must be said that it is a limited prerogative and that those limits must be clearly spelt out by the Constitution.

3.4 THE LIMITS OF THE FOREIGN AFFAIRS POWER

As a sovereign republic, Kenya is independent of any other political authority. The classical concept of sovereignty involves two elements: external independence or the freedom of action from any state outside its borders and internal independence or freedom of action on subjects within its borders.¹⁰⁰ Because of its internal independence a country may adopt any Constitution, law, statute or policy it deems fit for its own management. In a democratic system, this internal independence can only operate within harmony that implies limitations of powers. In this regard, we can say that the foreign affairs power is limited for it is not a power at large as the altogether general state law-making power is.¹⁰¹ It is limited by its nature in the national sphere because it is a power laid out in a particular kind of instrument that implies specific limitations, and partly it is determined by domestic politics and factors, otherwise the unity of country policy is disrupted and identification lost.

Because of its external independence, a country may discretionarily decide on its international policy and manage its international affairs. In this sense, the power is limited partly by the peremptory norms of international law (*jus cogens*), which any act of the foreign affairs power is to abide by, and partly by the specific regulations of any international negotiation the state gets involved in. For example, if the state is a party to a bilateral or multilateral

98 On treaties which should be approved in Parliament, see, for example, E McNair 'When do British treaties involve legislation' (1928) 9 *British Yearbook of International Law*.

99 See Markesinis (n 94 above) 288.

100 See K Kinoti 'International law themes in Kenyan constitutional law: A study of the interplay between national and international law' (1997) LL.B Dissertation University of Nairobi 48.

101 See P H Lane *A manual of Australian constitutional law* (1997) 55.

treaty, the implementing law must adhere itself to the terms of the treaty.

This aspect, the management of international affairs, provides the basis of our concern with the Foreign affairs power,¹⁰² a power that must be regulated. However, the question arises — Should the law address the regulation of the foreign affairs power? If so, Should it be designed, regulated and framed within the Constitution? The answer to both questions would seem to be positive for the following reasons:

- First, the conduct of the foreign affairs power affects the very essence of the political and social life of a country—its relation with other members of the international community. This has become particularly important in the last decades as the evolution of the external life somewhat determines the quality of life at the domestic level and, consequently, affects its subjects directly. Moreover, there is an increase in interdependence as trade, technology transfer, investment, travel, migration and other transactions are continuously multiplying.¹⁰³ Its legal regulation is essential for ‘it provides the mechanisms, forms, and procedures by which nations maintain their relations, carry on trade and other forms of intercourse, resolve differences and disputes’¹⁰⁴ and it gives some

102 In Kenya's Independent Constitution there was no express provision concerning the exercise of the power of foreign affairs. The only partial mention of this power was to be found in s 111 which gave the President ‘the power to appoint a person to hold or act in the office of Ambassador, High Commissioner or other principal representative of Kenya in another country, and to remove from office any person holding or acting in any such office.’ In addition, s 23(1) of the same Constitution provided on the executive powers that ‘the executive authority of the Government of Kenya shall vest in the President and, subject to this Constitution, may be exercised by him either directly or through officers subordinate to him.’ These two sections, one on the appointment of envoys and one on the executive function, contained all constitutional regulations to be applied in the exercise of the foreign affairs power in Kenya till 2010. They implied not only that the President has the power to conduct diplomatic relations, but also that he has the primary responsibility for the conduct of foreign affairs.

103 See more on interdependence in M P Sullivan ‘Transnationalism, power politics, and the realities of the present system’ in M Williams *International law in the Twentieth Century: A reader* (1989) 255.

104 L Henkin ‘The role of law and its limitations’ in M Williams (n 103 above) 189.

predictability and uniformity to the action of subjects in international relations.¹⁰⁵

- Second, the exercise of the foreign affairs power requires external checks and balances which should be established by the Constitution for they affect the political balance suspended on the fence of separation of powers. Constitutional government has come to suggest limited government and Constitutions have become a blueprint for a system of government. They share out authority among a set of different branches in which limitations are implied, or should be implied. Constitutions should lay the foundation for external checks and the separation of powers, as 'this separation of powers is designed, at least in part, to safeguard the people's liberties'¹⁰⁶ which is an essential feature of any democratic system. However, in a democratic system any given individual or group of individuals, if unrestrained by external checks, will tyrannise others because the elimination of external checks produces tyranny.¹⁰⁷ Therefore, it can be affirmed that the exercise of the foreign affairs power is in itself a section of the constitutional powers vested by the Constitution in a specific organ. Then, as a power, it would have to be subject to external checks because the absolute accumulation of powers in the same hands implies tyranny. In order to establish those external checks on the exercise of the foreign affairs power it would seem correct to affirm that the Constitution, as the source, pillar and foundation of the power itself, must provide for external checks to be applied.
- Third, the foreign affairs power is an executive function. The wording 'executive function' refers to what pertains to the executive power, something that belongs to the office of the executive, it is its business and no one else's. In order to understand the concept of executive power it

105 As above 197.

106 Henkin (n 5 above) 3.

107 According to Dahl, 'external check' consists of the application of rewards and penalties, or the expectation that they will be applied, by some source other than the given individual himself and 'tyranny' is every severe deprivation of a natural right. This is a close approach to Madison's writings. See R A Dahl *A preface to democratic theory* (1956) 6.

must first be clarified what 'executive' is. The 'executive' may mean he who 'carries out' as in the US Constitution, where the president is given the duty to 'take care that the laws be faithfully executed.' However, Mansfield argues that this would make the president an 'errand boy.' Taking care to execute the law faithfully is only one of the duties imposed on the presidency for the performance of which he is given several enumerated powers. Moreover, he is vested with the 'the executive power' which according to Hamilton's famous argument¹⁰⁸ has a nature of its own that is not exhausted by the enumerated powers, and he, in most countries, takes an oath not to faithfully execute the law but to faithfully execute his office.¹⁰⁹

But who is the executive? In Machiavelli's thought, the Prince should be one, because execution is sudden, decisive, energetic, extra-ordinary and extra-legal. In his *Prince* Machiavelli vests the primacy of war and foreign affairs in the executive. However, it was John Locke who first conceived the executive in its modern form. Locke offered the doctrine of the separation of powers, in which the executive appears as one power, the natural power, subject to the supremacy of the legislative power. The legislative power is conceived by Locke as a supreme collective body which is placed in the hands of 'diverse persons' who assemble and then separate so that they themselves become subject to the laws.¹¹⁰

These developments evolved in the modern concept of the executive who, according to Ojwang, is the organ, person or group of persons recognised as having the competence to perform the execution of laws, maintenance of public order, management of state property, foreign policy, military operation, the provision of such services as education, public health, transport as well as State assistance and insurance or other public functions.¹¹¹

108 'Pacifus' no. 1 (29 June 1973). The paper of Alexander Hamilton, Harold C. Syrett ed. 26 vols (New York, Columbia University Press, 1961-79) XV 33-43 *Federalist* 70.

109 H C Mansfield 'The modern doctrine of executive power' *Presidential Studies Quarterly* 237.

110 As above.

111 Ojwang (n 45 above) 76.

Moreover, to affirm that foreign affairs is an executive function is logical. Yet, to say that foreign affairs is 'exclusively' an executive function is not justified. Certainly, there is an obvious need to conduct governmental affairs effectively, expeditiously and inexpensively and, it must be said, no administrative rule-making procedure is acceptable unless it fairly takes account of this consideration. Consequently, procedural requirements that unduly fetter agency action, or frustrate its purposes, are obviously misdirected.¹¹² But it seems a mistake to exalt presidential over senatorial expertise in the conduct of foreign affairs for the mere interest of making it expeditious and effective.¹¹³ Effectiveness and promptitude do not mean, however, that executive functions as such should be unlimited within the set of rules regulating the function because 'the exercise of the executive power in any State ought to be conducted within a framework of appropriate checks'¹¹⁴ and this is done through the Constitution. The dilemma between effectiveness and promptitude on the one side and checks and balances on the other must not be resolved by getting rid of either. Instead, proper and effective checks and balances must be found for each function within each constitutional system.

4 THE IMPLEMENTATION OF THE FOREIGN AFFAIRS POWER IN AFRICA

In Africa, many former colonies of Great Britain have been relatively more successful or stable in the operation of constitutional government¹¹⁵ than former colonies of the continental European countries.¹¹⁶ It is not our intention to look into the historical reasons for this. However, there may have been some aspects of the British ways of carrying out colonization that helped certain countries to get themselves better organised. The British left strong institutions

112 Bonfield (n 13 above) 222.

113 R. Berger 'The presidential monopoly of foreign treaties' (1972-73) 71 *Michigan Law Review* 56.

114 J B Ojwang 'Application of treaties: Legislative control of executive powers' 220, Presentation at Downing College Cambridge in August 1981.

115 Kenya, Tanzania, Botswana, Namibia among others.

116 Congo Brazzaville, Congo-Kinshasa, Equatorial Guinea, Angola, The Gambia, Rwanda, Burundi, the former Somalia, Côte d'Ivoire, Mozambique, Madagascar.

but did not have enough experience with written Constitutions, and usually opted for a simplified version of their own Constitution upon granting independence to their former subjects. British parliamentary procedure proved sufficiently adaptable to remain in use for some time after the departure of the British administration, but later became insufficient for the needs of the country or lost its 'sacrosanct character', to the advantage of the ruler in control.

Guided by the fact that France's former colonies in Africa achieved independence after the founding of the Fifth Republic, they modelled their new Constitutions upon General de Gaulle's, partly because this would seem to enhance the power of the leaders under whom independence had been achieved. The constitutional history of some African countries is sad and it will take time, perhaps generations, for some countries to get back to the track of real and objective constitutionalism, directed towards justice, peace and development. Many African Constitutions are beautifully designed and they could be held as magnificent charters on human rights and international openness as we have said before. However, these aspirations in most African countries remain at the theoretical level. Certainly, theory is a good starting point, but Africa is yet to reach the goal.

4.1 THE CONSTITUTION OF ALGERIA

The Constitution of Algeria was adopted on 19 November 1976 and has been effective since 22 November 1976. It was revised in 1986, in November 1988, in February 1989. There were major changes on 26 November 1996; and lastly on 12 November 2008 to allow President Bouteflika run for a third term. From independence in 1962 Algeria was governed by the National Liberation Front (*Front de Libération Nationale; FLN*), which was the sole legal political party. The FLN governed through an elected president, a prime minister appointed by him, and an elected National People's Assembly. Amendments in 1989 created a multiparty political system and declared the country a socialist republic. In the early stages of the country's first free national elections in 1991, the fundamentalist Islamic Salvation Front (*Front Islamique du Salut; FIS*) won the largest share of the vote. The armed forces then took power to prevent

the fundamentalists from gaining control of the National People's Assembly. Since then, the High Council of State took control of the country till 1999.

The Algerian Constitution empowers the President to appoint Ambassadors and Envoys upon the proposal of the Minister of Foreign Affairs. The President is also empowered to sign and, after consultation with the National Assembly, ratify and implement treaties, conventions and international agreements;¹¹⁷ to declare war and conclude peace with the approval of the National Assembly.¹¹⁸ Algeria's Constitution is essentially monist for it automatically incorporates treaties within its domestic legislation and grants properly ratified treaties a superior status to statutory provisions.¹¹⁹ However, their rank is below constitutional norms.

4.2 THE CONSTITUTION OF CAMEROON

The Constitution of the Republic of Cameroon was adopted on 18 January 1996 amended on 10 April 2008 in order to allow Paul Biya to continue running for presidency in 2011. The Cameroonian Constitution grants power to the President to conduct of foreign affairs. The President is the one who receives and sends ambassadors,¹²⁰ and negotiates agreements and

117 Art 77: 'The President of the Republic has the following powers and prerogatives: (3) He decides and conducts the foreign policy of the Nation; (9) He concludes and ratifies international treaties.'

118 Article 97: 'The President of the Republic signs armistice agreements and peace treaties. He receives the view of the Constitutional Council on the relevant agreements. He submits the latter immediately to be approved explicitly by each of the two chambers of the Parliament. Article 131: Armistice agreements, peace, alliance and union treaties, treaties related to State borders as well as treaties involving expenses not provided for in the State budget are ratified by the President of the Republic following an explicit approval by each of the chambers of the Parliament.'

119 Article 132: 'Treaties ratified by the President of the Republic in accordance with the conditions provided for by the Constitution are superior to the law.'

120 Art 5: '(1) The President of the Republic shall be the Head of State... He shall be the guarantor of the independence of the Nation and of its territorial integrity, of the permanency and continuity of the State and of the respect of international treaties and agreements. Article 8: (1) The President of the Republic shall represent the State in all acts of public life... (4) He shall accredit ambassadors and envoys extraordinary to foreign powers. The ambassadors and extraordinary envoys of foreign powers shall be accredited to him.'

treaties.¹²¹ However, the Constitution limits those powers by imposing an obligation to seek the Legislature's approval before ratification in matters that may have important consequences to the country's life or legislation. Article 36 establishes that:

The President of the Republic may, after consulting with the President of the Constitutional Council, the President of the National Assembly and the President of the Senate, submit to a referendum any reform bill which, although normally reserved to the Legislative Power, could have profound repercussions on the future of the Nation and national institutions. This shall apply in particular to: (b) bills to ratify international agreements or treaties having particularly important consequences.

The Cameroonian Constitution is well drafted from an international law perspective. It is one of the few world Constitutions bold enough to incorporate three key human rights instruments. It firmly states in its preamble:

We, the people of Cameroon... affirm our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations and The African Charter on Human and Peoples' Rights, and all duly ratified international conventions relating thereto...

In fact, these three Conventions expressly mentioned are usually published together with the national Constitution. The Constitution also contains a chapter on Treaties and International Agreements, which establishes the presidential limits to ratification of certain treaties,¹²² the need to amend the Constitution before ratifying an unconstitutional treaty¹²³ and the superior rank ratified treaties shall have over national legislation.¹²⁴ It is a modern and well-conceived

121 Art 43: 'The President of the Republic shall negotiate and ratify treaties and international agreements. Treaties and international agreements falling within the area of competence of the Legislative Power as defined in Article 26 above shall be submitted to Parliament for authorisation to ratify.'

122 As above.

123 Art 44: 'Where the Constitutional Council finds a provision of a treaty or of an international agreement unconstitutional, authorization to ratify and the ratification of the said treaty or agreement shall be deferred until the Constitution is amended.'

124 Art 45: 'Duly approved or ratified treaties and international agreements shall, following their publication, override national laws, provided the other party implements the said treaty or agreement.'

monist Constitution. However, as it happens in many African states the reality does not follow the word and most of these great aspirations remain, for the time being, on paper. Perhaps the drafting intended to satisfy donor pressure or Western ideals as it commonly happens in Africa. It would have been more realistic to be sober and cautious on the drafting without setting such high and farfetched goals.

4.3 THE CONSTITUTION OF EQUATORIAL GUINEA

Constitutional instability has been a common feature in the political history of Equatorial Guinea before and after its independence.¹²⁵ The history of Equatorial Guinea, a country with one of the highest GDP¹²⁶ index in the world is marred by human rights atrocities and pillage of public funds. However, Equatorial Guinea's Constitution is consistent and well designed. It was approved by a national referendum on 17 November 1991, and amended in January 1995. It boldly follows the principles of international law and reaffirms its attachment to the rights and obligations enshrined in the international organisations and bodies of which the nation shall be member.¹²⁷ It is a monist Constitution. International treaties rank below the Constitution but above domestic legislation. In its preamble it reads:

125 On 12 October 1968, the territory became the independent republic of Equatorial Guinea, with Francisco Macías Nguema as president. In 1972 Macías Nguema appointed himself president for life. In 1979 Macías Nguema was overthrown in a military coup, tried for treason, and executed. Lieutenant Colonel Teodoro Obiang Nguema Mbasogo, Macías nephew and the coup leader became president. In 1982 a new constitution was enacted under which Equatorial Guinea was a single-party state, and in 1991 a new multiparty constitution was approved by public referendum. Under the 1991 constitution, the voters elect a president to a seven-year term with no term limits. On 29 November 2009 Teodoro Obiang Nguema was re-elected president by 95.8% of the voters. His closest contender, Plácido Mico, obtained 3.6%. Elections have always been marred by widespread fraud. See www.cia.gov/library/publications/the-world-factbook (accessed on 10 October 2010).

126 According to the CIA *World Factbook* Equatorial Guinea has a GDP of USD 37,500. It is number 28 in the world (between Ireland and Sweden). The next African country on the list is Gabon which ranks no. 81. See www.cia.gov/library/publications/the-world-factbook (accessed 10 October 2010).

127 Art 8: 'The state shall endeavour to follow the principles of international law and shall reaffirm its attachment to the rights and obligations enshrined in the characters of international organizations and bodies of which it shall be member.'

We, the people of Equatorial Guinea, conscious of our responsibility before God and history ... desirous of upholding the authentic African spirit of family and community adapted to the new social and legal structures of the modern world ... Conscious of the fact that the charismatic authority of the traditional family is the foundation of the Equato-Guinean Society, firmly support the principles of social justice and solemnly reaffirm our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights of 1948...¹²⁸

The foreign affairs power is exercised by the President as established by Article 39.¹²⁹ The President signs and ratifies treaties except peace and trade treaties and those affecting national sovereignty and territorial integrity, the ratification of which is reserved to the National Assembly.¹³⁰ The Constitution also creates a Constitutional Council which, among other functions, shall look into the non-conformity of international treaties as provided by the Constitution.¹³¹

4.4 THE CONSTITUTION OF MADAGASCAR

The Constitution of the Republic of Madagascar was adopted on 19 August 1992. The Republic of Madagascar became independent in 1960, having been an autonomous republic in the French Community from 1958. The country was ruled from 1960 to 1972

128 The Preamble's original text reads: 'Nosotros, pueblo de Guinea Ecuatorial, consciente de nuestra responsabilidad ante Dios y la historia; Animados por la voluntad de salvaguardar nuestra Independencia total, de organizar u consolidar nuestra unidad nacional; Deseosos de mantener el auténtico espíritu tradicionalmente Africano de organización familiar y comunal adaptándolo a nuevas estructuras sociales y judiciales acordes a la vida moderna; Conscientes de que el sentido de la autoridad carismática de, la familia tradicional es la base de la organización de la sociedad ecuatoguineana; Apoyados firmemente en los principios de la justicia social reafirmados solemnemente en los derechos y libertades del Hombre definidos y consagrados por la Declaración Universal de los Derechos del Hombre en 1948...'

129 Art 39: 'The President of the Republic shall exercise the following functions: H. He shall negotiate, ratify international treaties and agreements in accordance with the Constitution. I. He shall represent Equatorial Guinea in international relations, receiving and accrediting Ambassadors, and shall authorize Consuls in the performance of their duties.'

130 Art 64: 'The functions of the National Assembly shall be as follows: Approve peace and trade treaties, those that affect national sovereignty and territorial integrity; those relative to a legal reserve are ratified by the President of the Republic.'

131 Art 94: 'The constitutional Council shall comprise a President and four other members appointed by the President of the Republic. The attributions of the constitutional council shall comprise the following: Taking cognizance of the non-conformity of international treaties as provided by the constitution.'

through a bicameral legislature consisting of a national assembly, directly elected by universal adult suffrage, and a senate, one-third of which was nominated by the president and the rest of which was indirectly elected.

Between 1972 and 1975 Madagascar was under military rule. Radical political and economic reorganisation was instituted in 1975, and a new Constitution was implemented later that year for the renamed Democratic Republic of Madagascar. The Constitution established the presidency; the Supreme Revolutionary Council, a body of members including the president, prime minister, military chiefs, some ministers, and other nominated leaders; a unicameral legislature, the People's National Assembly, composed of deputies directly elected and other organs.

With the subsequent failure of the government's utopian policies and the devastation and virtual bankruptcy of the economy, the Constitution was relaxed, again allowing for opposition parties, of which two became very powerful. Pressing for abolition of the Supreme Revolutionary Council and the Military Development Committee, the opposition has also sought the adoption of a new Constitution.¹³²

The country's constitutional order is currently under great tension. On 17 March 2009, democratically elected President Marc Ravalomanana resigned and handed over to the military, which conferred the presidency on opposition leader and Antananarivo mayor Andry Rajoelina, who will head the High Transition Authority for a 15-month transition period, concluding in general elections. The agreement has not been fully implemented. In order to allow Rajoelina to stay in office until elections are held in 2011, the country voted in favour of a constitutional referendum on 17 November 2010. Rajoelina's position, however, was challenged in an unsuccessful military coup attempt on 17–18 November 2010. The Preamble to the 1992 Constitution establishes the moral obligation to be faithful to international commitments. It also adopts within the law of Madagascar several international instruments on human rights. The Preamble expresses itself in the following terms:

¹³² See 'Madagascar' in *Encyclopaedia Britannica Multimedia Edition*.

The sovereign Malagasy people ... faithful to their international commitments; adopting the International Charter of Human Rights, the African Charter of Human Rights, the Convention on Children's Rights, and considering these to be an integral part of their law...¹³³

The Constitution also establishes the competencies in matters of diplomacy and treaties in simple and clear terms. The foreign affairs power is vested on the President. He negotiates and ratifies treaties and should be informed of any process of treaty negotiation not leading to ratification.¹³⁴ In Madagascar treaties rank below the Constitution but above statutory law. However, certain treaties must be submitted by the President to the Constitutional Court before ratification. Should a treaty require constitutional amendments, such changes need to be effected before ratification.¹³⁵

4.5 THE CONSTITUTION OF SOUTH AFRICA

South Africa's Constitution was adopted in 1996 and became gradually operational between 1997 and 1999. It has gone through 16 amendments mostly related to municipal boundary changes and other descriptive issues. From 1948 to 1993 apartheid was at the core of South Africa's legal structure. In 1983 a new Constitution was adopted. It granted limited political rights to the country's 'Coloured' and Asian minorities while continuing to exclude blacks from political rights. There was no parliamentary representation for the country's black majority. The 1983 Constitution also increased the powers of South Africa's chief executive, the state president.

133 See 1992 Constitution of Madagascar, Preamble.

134 Art 56: '(1) The President of the Republic shall accredit and recall ambassadors and envoys extraordinary of the Republic of Madagascar to foreign States and international organisations. (2) He shall receive credentials and requests for recall from States and international organisations recognised by the Republic of Madagascar. (3) He shall negotiate and ratify treaties. He shall be informed of all negotiations leading to the conclusion of an international agreement which is not submitted for ratification.'

135 The Constitution's art 82 imposes limitation *rationae materiae*. It reads: 'VIII) Ratification or approval of alliances or commercial treaties, treaties or agreements regarding international organisation which commit State finances, which deal with the status of persons, peace treaties, treaties which involve the ceding, exchange or acquisition of territory must be authorised by law. Prior to any ratification, treaties shall be submitted by the President of the Republic to the Constitutional Court. In case of non-conformity with the Constitution, ratification may take place only after Constitutional revision.'

On 11 February 1990 Mandela was released from prison. South Africa had begun to dismantle the apartheid system. From 1991 the government undertook negotiations with the African National Congress (ANC) and other groups on the establishment of a Constitution that would enfranchise the country's black majority. In 1993, the government and the black opposition agreed on the mechanisms for a transition to non-racial democratic government in South Africa. The two chief mechanisms were:

- An interim executive committee with a black majority that oversaw matters pertaining to the country's first non-racial multiparty elections; and
- An interim Constitution that remained in force until a permanent Constitution for a post-apartheid South Africa was drafted. The interim Constitution of 1993 called for a bicameral parliament consisting of a National Assembly elected by proportional party representation and a Senate elected by the provincial legislatures.

A permanent post-apartheid Constitution was adopted in 1996. The South African system is peculiar and unique in many ways. While it encourages interpretation according to international law it also places restrictions and regulations on treaty making and states clearly that the Constitution is the supreme law of the land and nothing may contradict it. The South African system has the following foundations:

- The foreign affairs power is bestowed upon the executive;¹³⁶
- The National Assembly and the National Council of Provinces must approve binding treaties, except technical, administrative or executive nature, or an agreement which does not require either ratification or accession;¹³⁷
- International agreement will become domestic law when it is enacted by national legislation;

136 Art 231: '(1) The negotiating and signing of all international agreements is the responsibility of the national executive.'

137 Art 231: '(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).'

- Self-executing provisions of an agreement that has been approved by Parliament is automatically law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament;
- Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament;

Therefore, the system is hybrid. It gives way for dualism, when treaties must be passed in statutory form for domestication,¹³⁸ and it is monist for self-executing provisions which do not require statute.¹³⁹ It is also monist when it comes to the application of international law principles by national courts.¹⁴⁰ Furthermore, it encourages courts to favour international law dictates when interpreting law.¹⁴¹ In South Africa, treaties are of a lesser rank than statutory law.

4.6 THE CONSTITUTION OF UGANDA

The present Ugandan Constitution was adopted on 22 September 1995 and amended in 2000, and 2005 to remove presidential term limits and legalize a multi-party political system. The National Resistance Council was established in 1986 after the end of the civil war in 1985 and the country took shape in the following years. The Ugandan Constitution declares the foreign policy objectives among the National Objectives and Directives of State Policy. According to Principle XXVIII:

138 Art 231: '(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.'

139 Art 231: '(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.'

140 Art 232: 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.'

141 Art 233: 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

the foreign policy of Uganda shall be based on the principles of — (a) promotion of the national interest of Uganda; (b) respect for international law and treaty obligations; (c) peaceful co-existence and non-alignment; (d) settlement of international disputes by peaceful means; (e) opposition to all forms of domination, racism, and other forms of oppression or exploitation.¹⁴²

This directive principle backs any international commitment Uganda assumes, and, by not complying with it the state would be violating the principle. The Constitution regulates international relations in sections 122, 123 and 124. In relation to diplomacy, the President, with the approval of Parliament, appoints and receives ambassadors and heads of diplomatic missions.¹⁴³ Treaty-making power is also vested in the president, who may delegate such power, and there are no restrictions *rationæ materiæ*.¹⁴⁴

Although the Constitution does not directly limit the president's powers in treaty-making, it vests in Parliament the task of making laws to govern the ratification of treaties and international agreements. In this manner treaty-making regulations become flexible and changeable according to the needs of the country. In fact, there has been innovative jurisprudence in matters relating to

142 Number XXVIII of the Uganda Foreign Policy Objectives reads: '(i) The foreign policy of Uganda shall be based on the principles of (a) promotion of the national interest of Uganda; (b) respect for international law and treaty obligations; (c) peaceful co-existence and non-alignment; (d) settlement of international disputes by peaceful means; (e) opposition to all forms of domination, racism, and other forms of oppression or exploitation. (ii) Uganda shall actively participate in international and regional organisations that stand for peace and for the well-being and progress of humanity. (iii) The State shall promote regional and pan-African cultural, economic and political co-operation and integration.'

143 S 122: '(1) The President may, with the approval of Parliament, appoint Ambassadors and Heads of Diplomatic missions. (2) The President may receive envoys accredited to Uganda.'

144 S 123: '(1) The President, or a person authorised by the President may make treaties, conventions, agreements, or other arrangements between Uganda and any other country or between Uganda and any international organisation or body, in respect of any matter. (2) Parliament shall make laws to govern ratification of treaties, conventions, agreements or other arrangements made under clause (1) of this article.'

automatic domestication of international agreements through the 'spirit of the law' as was the case in *Uganda v. Matovu* (2002).¹⁴⁵

5 THE IMPLEMENTATION OF THE FOREIGN AFFAIRS POWER IN KENYA

In Kenya, according to the new constitutional dispensation, the system is entirely monist and legislative approval of a treaty is not required at any instance, except as provided for by Article 71 on agreements relating to natural resources.¹⁴⁶ International law is a source of law and treaties once ratified are part of domestic law. This is stated as follows in Article 2(5) and (6):

(5) The general rules of international law shall form part of the law of Kenya. (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

However, the position and drafting of the Article 2 of the Constitution of Kenya seem to imply, and this is our view, that international law's

145 In *Uganda v. Matovu*, High Court of Uganda at Kampala, 21 October 2002, the defendant Peter Matovu was indicted on charges of defilement. The common law in Uganda states that when considering a sexual offenses trial, the victim must be proven as truthful before the court which will base a conviction on her testimony alone. In *Uganda v. Matovu*, Judge E. S. Lugayizi cited a case from 1997 which espoused the traditional reason behind this rule: '...for all sorts of reasons and sometimes for no reason at all, women and girls tell a false story which is very easy to fabricate but extremely difficult to refute...' However, Judge Lugayizi recognised that this traditional rule was in conflict with Uganda's legal obligations under CEDAW. He argued that, 'under Article 21 of the [Ugandan] Constitution that proclaims equality of all persons under the law, equal protection of the law, and prohibition against discrimination on the ground of sex, Uganda enacted the heart of the above international instruments in one stroke and therefore Uganda has the obligation to give effect to the contents of those international instruments.' Thus, the judge held that the discriminatory rule was unconstitutional and therefore null and void. This case shows how a country's local jurisprudence must be made to comply with international legal obligations, specifically the ratification of CEDAW. See 'Legal tools for the establishment of gender equality through international law' available at www.globaljusticecenter.net (accessed on 10 October 2010).

146 Agreements relating to natural resources: '71. (1) A transaction is subject to ratification by Parliament if it— (a) involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya; and (b) is entered into on or after the effective date. (2) Parliament shall enact legislation providing for the classes of transactions subject to ratification under clause (1).'

hierarchy is placed below the constitutional norm.¹⁴⁷ It may help if we take a general view to Article 2:

- (1) This Constitution is the **supreme law of the Republic** and binds all persons and all State organs at both levels of government.
- (2) No person may claim or exercise State authority except as authorised under this Constitution.
- (3) The **validity or legality of this Constitution is not subject to challenge** by or before any court or other State organ.
- (4) **Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.**
- (5) The general rules of international law shall form part of the **law of Kenya**.
- (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya **under** this Constitution. [emphasis mine]

From this Article, we can deduce the following:

- The Constitution is the supreme law of the land and its supremacy is not subject to challenge;
- International law is part of the law of the land but not part of this Constitution as is the case in some countries.
- Any law, whether domestic or international, inconsistent with the Constitution will be void to the extent of that inconsistency;
- Treaties are part of the law of Kenya under the Constitution, not above and not with the Constitution but may be above domestic laws in Kenya as the High Court of Kenya declared a few weeks after the Constitution's promulgation.¹⁴⁸

147 In Cameroon, for example, the international human rights instruments are included as part of the Constitutional Preamble. See paragraph 4.2 above.

148 See next sub-heading on *Zipporah Wambui Mathara* Bankruptcy Cause 19 of 2010, in the matter of Bankruptcy Act Chapter 53 of the Laws of Kenya [2010] eKLR (24 September 2010)

Therefore, international law is part of Kenya's legal system provided it is consistent with the Constitution, for the Constitution must be held as the supreme law of the land above which there is no other. Should international norms contravene the Constitution they shall not be applicable to Kenya to the extent of the contradiction.

Treaties, however, have been placed below the Constitution but above domestic legislation. This is inferred from certain sections. For example, the National Human Rights and Equality Commission is empowered by the Constitution to ensure the Republic's compliance to ratified human rights treaties¹⁴⁹ in what could be understood as disregard to any contrary domestic legislation. The Constitution also gives treaties supremacy above domestic legislation when it provides under Article 143 (4) that 'the immunity of the President shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity.'

Regretfully, we also find in the Constitution a certain inconsistency in regard to the supremacy of international law and treaties. This contradiction appears between Articles 21(4) and 51(3)(b). While Article 21 on the implementation of rights and fundamental freedoms states under clause (4) that 'The state shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms' Article 51(3) (b) provides that 'Parliament shall enact legislation that takes into account the relevant international human rights instruments.' We face here two different and contradictory parameters:

- One demands for the enactment and implementation of domestic legislation for the fulfilment of obligations of international nature;
- The other instructs parliament to take into account international obligations when enacting legislation.

This seems a contradiction because in a monist system there is no need to legislate ratified treaties. This section, thus, seems unnecessary and redundant in a system that integrates international law within domestic law to the extent Kenya's Constitution does. Instead, Article

149 See art 59(g).

51(3)(b) is appropriate. In this Article, the Constitution is actually stating international law and treaties as having supremacy over the enacted domestic law. The Constitution asserts this by instructing parliament to take into consideration international obligations when enacting domestic legislation. Thus, we can infer, the Constitution prevents domestic legislation from interfering with or contradicting international obligations acquired by the Republic.¹⁵⁰

5.1 TREATY-MAKING

Treaties or international agreements are one of the most important means by which states relate to one another and to different organs in the sphere of international law. Hence, they are one of the most important elements constituting the foreign affairs power. The nature of treaties is defined by the subject of the treaty, the consent expressed, and the object or aim of the treaty. Many terms are employed indiscriminately to refer to treaties: treaty, convention, protocol, act, final act, accord, arrangement, concordat, etc. However, the fact that a document may be called a treaty does not depend on its denomination. Rather, it depends on whether it fulfils the conditions to be a treaty or not, independent of its name or title. In order to be a treaty, an instrument must be:

- concluded in a written form;
- between two or more subjects of international law with treaty-making capacity; and
- creates or intends to create a relation within the sphere of international law.

A treaty brings about 'external effects' which bind a state to fulfil an international obligation. It may also produce 'internal effects' if it intends to produce some change in the municipal legal system. External and internal effects depend primarily on the fulfilment of the legal formalities established by law. For example, a treaty will have international effects if it fulfils the international law requirements, i.e. that signature, ratification, or other formalities have been performed

¹⁵⁰ The fact that international law is part of the domestic order will also make a direct impact on provisions such as art 150 (b)(ii) on the removal of the Deputy President, art 152 (6)(b) on the removal of a Cabinet Ministers and art 181 (1)(b) on the removal of county governors.

according to law. If these formalities are fulfilled it is said to be a '*valid*' treaty; it has validity. Similarly, a treaty will have internal effects if it fulfils the municipal law requirements for treaty making. If these requirements are not fulfilled the treaty may be valid, but there is 'inability to perform'.

For a treaty to produce internal effects, it has to be incorporated within the municipal legal system. As we have examined above, this incorporation can be automatically at the time of ratification (monist system) or indirect, by legislative enactment of the treaty (dualist system). Both systems may bring about difficulties relating to supremacy, temporal validity and constitutionality of treaties in reference to municipal law. Nevertheless, whatever may be the case 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty', unless the internal rule violated is of fundamental importance or the violation is manifest, i.e. 'the violation was objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.'¹⁵¹

Treaty making in Kenya is yet to develop a consistent practice. The old Constitution did not regulate it and the executive had the sole power over the matter. The Executive signed and ratified any treaty, but no treaty could produce internal effects unless it was translated into statutory law. The difficulty then was double; consent of the legislature was not required for ratification but for adopting a treaty into the Kenyan municipal law after it had already been ratified.

The Harmonised Draft published on 17 November 2009 by the Committee of Experts on Constitutional Review pursuant to section 32(1)(a)(i) of the Constitution of Kenya Review Act, 2008 stated in Article 81(4) that 'With the approval of Parliament, the State President may sign instruments of consent of the Republic to be bound by treaties and international agreements.' Further, in Article 87(d) it stipulated that the State shall 'domesticate international and bilateral agreements and treaties.' This Harmonised Draft gave

151 Compare with 1969 Vienna Convention, art 27 & 46.

Parliament the role of ‘considering and approving treaties and international agreements.’¹⁵²

The Harmonised Draft represented a clear step forward towards the clarification and establishment of a well-defined system for international law domestication. The subsequent version of this draft, known as the Revised Harmonised Draft Constitution vested the power to consider and approve treaties and international agreements on the National Assembly by virtue of its Article 119.¹⁵³ However, we have already stated that in the 2010 Constitutional dispensation of Kenya, there was a dramatic shift in wording and conception of the relation between international law and constitutional law in Kenya.

We can actually conclude that the Harmonised Draft and the Constitution Kenyans voted in the 4 August 2010 referendum were two different documents. While the Harmonized Draft clearly established the need for parliamentary intervention before enforcement, the 2010 Constitution of Kenya provides a monist system with no clear instructions on signature and ratification. It actually neglected to define the power to ratify, which we must say, is a rather grave omission for a monist Constitution. And once this abeyance is in place, the gap must be filled through the principle of executive residual functions.

This means, whenever the President ratifies a treaty he will be legislating with no checks and balances and that those treaties actually abrogate any internal legislation that contradicts them. In the recent case of *Zipporah Wambui Mathara* of 24 September 2010, Justice Koome asserted that:

by virtue of the provisions of Section 2(6) of the Constitution of Kenya 2010, International Treaties, and Conventions that Kenya has ratified, are imported as part of the sources of the Kenyan Law. Thus, the provision of Article 11 of the International Covenant on Civil and Political Rights which Kenya ratified on 1st May 1972 is part of the

152 Art 124(2)(g) of the Harmonised Draft published on 17 November 2009 by the Committee of Experts on Constitutional Review pursuant to section 32(1)(a)(i) of the Constitution of Kenya Review Act, 2008.

153 See G Mwangi ‘Bringing down the walls of Jericho’ (unpublished paper Nairobi, 2010).

Kenyan law. This covenant makes provisions for the promotion and protection of human rights and recognises that individuals are entitled to basic freedoms to seek ways and means of bettering themselves. It obviously goes without saying that a party who is deprived of their basic freedom by way of enforcement of a civil debt through imprisonment, their ability to move and even seek ways and means of repaying the debt is curtailed. (...) An order of imprisonment in civil jail is meant to punish, humiliate and subject the debtor to shame and indignity due to failure to pay a civil debt. That goes against the International Covenant on civil and political rights that guarantee parties basic freedoms of movement and of pursuing economic social and cultural development. For the above additional reasons I will allow the application.¹⁵⁴

The case above brings down the barriers for the fulfilment of treaty obligations. Nevertheless, an appropriate process for ratification of treaties with the relevant checks and balances must be put in place, if necessary through subsidiary legislation. Until this is done, the President will be ratifying treaties that are superior to domestic laws without checks.

5.2 DIPLOMACY

In the decades since World War II, says Newsom,¹⁵⁵ diplomatic relations have become symbols in the conflict of nerves among nations. Wars are no longer declared. The deliberate niceties of returning passports, once a signal of a serious break between countries, are seldom followed. Relations are broken on sudden impulse and with little ceremony and nations use this gesture to satisfy internal political pressures or express momentary anger. Although diplomacy has changed, it is not possible to deny its importance, not only in strengthening a nation's power externally but also internally. In a world like today's, isolation will undoubtedly lead to ruin. Well conducted diplomacy will create ways of gaining knowledge from other state's experience, attract investors and create the necessary or attractive climate for the proper development of relations with other countries.

154 *Zipporah Wambui Mathara Bankruptcy Cause* (n 148 above).

155 D Newsom *Diplomacy under a foreign flag: When nations break relations* (1948) 3.

The problem of deciding what practices or tactics are most effective in negotiating is a difficult one and should be addressed on *ad hoc* basis. The German-American political scientist Hans J. Morgenthau in his book *Politics among nations* (1948) perhaps best summed up the ideal of modern diplomacy as follows:

- i. diplomacy must be divested of its crusading spirit;
- ii. the objectives of foreign policy must be defined in terms of the national interest and must be supported with adequate power;
- iii. diplomacy must look at the situation from the point of view of other nations;
- iv. nations must be willing to compromise on all issues that are not vital to them;
- v. the armed forces are the instrument of foreign policy, not its master; and
- vi. the government is the leader of public opinion, not its slave.¹⁵⁶

Constitutional regulation of diplomacy could contain general philosophical aspirations in a preamble, but it certainly must contain specific legal aspects concerning the appointment of high-rank diplomats. It may, however, be wise to be as open as possible in order to provide for new forms of diplomacy which may emerge in future. In this regard, Article 132(2)(e) and (4)(b) of the 2010 Constitution of Kenya defines among the functions of the president:

The President shall nominate and, with the approval of the National Assembly, appoint, and may dismiss high commissioners, ambassadors and diplomatic and consular representatives; and the President may receive foreign diplomatic and consular representatives.

The drafter of Article 132 may have overburdened the system by mentioning ‘diplomatic and consular representatives.’ Strictly speaking, any diplomatic appointment will then be subject to presidential nomination and parliamentary approval. Usually, these appointments of lower ranking officials, and the structure of the diplomatic system in a country, need not be regulated by constitutional law, as they are procedural matters which do not

¹⁵⁶ See ‘Stanley J. Michalak, Jr.’ in *Encyclopaedia Encarta*.

imply a delegation of power or a sharing of power, and therefore are to be resolved by laws of a lesser rank.

5.3 WAR AND PEACE

War is present in human history as a never-ending nightmare. In its evolution it has turned from being a 'game of professionals' into being an 'instrument of annihilation'. Man's survival instinct and the horrible experiences of this century's wars have led the international community to regulate not only the commencement of war, but also its conduct. In this task, a foremost important start is to define war as a 'hostile interaction between two or more states. This interaction can be *de facto* by the actual use of force, or *de iure*, produced by a declaration of war.'

Declarations of war were the normal procedure to start a war. A declaration would record the start of hostilities from a juridical point of view and, therefore, would yield to the application of humanitarian laws. This scenario changed after 1945 with the insertion in the United Nations Charter of an obligation to refrain from the use of force. After 1945 states would be reluctant to declare war for this would violate the provisions of the UN Charter. Ever since, *de facto* war became the common procedure and this made the application of humanitarian laws more difficult. The concept of humanitarian intervention then appeared in the international scenario as a means to secure the fulfilment of humanitarian norms.

From the constitutional law perspective, it has been important to ascertain who has the capacity to declare war according to the internal arrangement of a state. Two approaches appear to be of paramount importance for our study:

- The British system: the King, considered the representative of his people, had the 'sole prerogative of making war and peace.'
- The French system: the constitutional competence for the declaration of war according to the ideals of the French Revolution was posed as follows:
 - i) There is an international necessity of a formal declaration of war;
 - ii) the legislature has the primacy over the executive in war and peace; and

- iii) subordination to the new principle of renunciation to war.

These approaches developed into three modern models on the capacity to declare war:

- *La déclaration de guerre ressort uniquement à la compétence du pouvoir exécutif* (The declaration of war evolves only from the competence of the executive power).
- *Le consentement du parlement est nécessaire pour une déclaration de guerre* (Parliamentary consent is necessary for a declaration of war.)
- *Les déclarations de guerre sont de la compétence exclusive des assemblées législatives* (Declarations of war fall within the exclusive competence of the legislative assemblies).

In addition, a declaration of war may be openly considered, i.e. at any stage a country may declare war on another (e.g. the 1995 Ugandan Constitution). It may be restricted, i.e. war is to be declared only in case of external aggression or self-defence (e.g. the 1993 Russian Constitution) or it may also be banned altogether (e.g. the 1947 Italian Constitution and the 1946 Japanese Constitution).

The constitutional regulation of declaration of war in Kenya was virtually non-existent until 27 August 2010. The past of Kenya did not disclose any practical experience in this regard. The word ‘war’ was practically foreign to the constitutional vocabulary of Kenya. The commencement of war was not regulated at any stage by Kenya’s municipal law. This omission had to be addressed because the regulation of war and peace contributes to the peaceful development of international relations and to the respect of human rights. Such declarations help determining the commencement and timely application of humanitarian laws, which enter into action once war is in place *de iure*. The 2010 Constitution of Kenya states the possibility of declaring a state of emergency in Article 58(1) as follows:

A state of emergency may be declared only under Article 132(4)(d) and only when— (a) the State is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and

(b) the declaration is necessary to meet the circumstances for which the emergency is declared.

Article 132(4)(e) also foresees the possibility of declaring war as follows: 'The President may ... with the approval of Parliament, declare war.' It further states in Article 95(6) that 'The National Assembly approves declarations of war and extensions of states of emergency.' Certainly, the 2010 Constitution is very clear and comprehensive on a point that was silent until now. The principles that guide war and peace in the exercise of the foreign affairs power may be summarised as follows:

1. To strengthen trends towards constitutionalism, which means the concept of governance based on law;
2. To support the adoption of constitutional safeguards governing war powers, so as to reduce the possibility of international conflicts;
3. To ensure that decisions concerning the use of force are made on a rational and responsible basis.¹⁵⁷

5.4 RECOGNITION OF STATES AND GOVERNMENTS

Recognition can be said, perhaps, to be one of the more pragmatic elements of the foreign affairs power. It depends on the whims of politics and convenience which change with the circumstances. Recognition is also a *conditio sine-qua-non* for the establishment of diplomatic relations since diplomatic relations in itself is a mode of recognition. In this context, recognition may be said to be the *culture media* which allows the growth and development of other elements of the foreign affairs power: the making of war and peace, the treaty-making power, and diplomatic relations. Hence, recognising states or governments means crossing the threshold into international law.

As is observed above, recognition, politically, is a discretionary act which may vary with the circumstances. Therefore, it does not seem to be desirable to enact in a written form, within the Constitution, rules on recognition of foreign states. However it is possible to include some general principle regarding 'recognition' within a set of principles in a preamble to a Constitution. However,

157 These are some of the points proposed by L F Damrasch (1991) 85 *American Journal of International Law* 93.

it may be convenient and desirable to protect a government against possible insurgence or belligerence, as is done by the 1995 Uganda Constitution. It provides in section 3(3):

This Constitution shall not lose its force and effect even where its observance is interrupted by a government established by the force of arms; and in any case, as soon as the people recover their liberty, its observance shall be re-established and persons who have taken part in any rebellion or other activity which resulted in the interruption of the observance, shall be tried in accordance with this Constitution and other laws consistent with it.

The adoption of appropriate legal provisions to regulate the foreign affairs power is but one of the many challenges of a modern nation such as Kenya. The 2010 Constitution is a step forward. However, jurisprudence and subsidiary legislation will have to fill the gaps left by the Constitution drafters. Only thus, we will continue making the history of Kenya a *harambee* story.

6 CONCLUSION

This chapter has dealt with the status of International law in constitutions. It analyses the regulation of foreign affairs power in the constitutions of some African countries but focuses on the Kenya's 2010 Constitution to demonstrate its departure from the previous constitutional order.

The *piece de resistance* of the new dispensation *vis a vis* treaties is the 'migration' from the dualist approach to the monist approach in the treatment of international law. This means that legislative approval of treaties in Kenya is not necessary, except as provided for under Article 71 of the Constitution as relates to agreements on natural resources. This new status accorded to International Law is further fortified in Article 2 (5) and (6) which provides that the general rules of International Law shall form part of the Law of Kenya and that any treaty or convention ratified by Kenya shall form part of the Law of Kenya.

The dramatic changes that have been analysed herald a new era that underscores the shift in the Constitutional status of International Law.

CHAPTER NINE

CONSTITUTION IMPLEMENTATION IN KENYA

VICTOR ODHIAMBO*

1 INTRODUCTION

The New Constitution is important for the fact that it creates certain obligations and limitations on the executive branch including the possibility of impeachment; it creates a more independent judiciary; it devolves power to local counties; and it creates a robust and progressive Bill of Rights. Despite such attributes, it is emergently clear that there is a greater challenge that lies in its implementation as opposed to its contents. This is because Constitutions are not merely texts, embodying concepts, principles, and ideals. They are living documents, and in Kenya's case, the new Constitution has to be brought to life by a deliberate and committed process as put forth in the implementation schedule of the document. Indisputably, the life of the new Constitution and whether or not Kenya lives the dream that we seek to gain out of a new constitutional dispensation shall be based on a proper utilisation of the functions of the institutions identified for purposes of implementation.

It is one thing to make a Constitution. It is quite another to breathe life into it, making it a living, vibrant document which affects, and hopefully improves, the reality of people's life. The fortunes of a Constitution are shaped by many factors: personalities and elites, political parties and other organisations, social structures, economic changes, traditions of constitutionalism and by the rules and institutions in the Constitution itself.¹ Thus, the Constitution has

* LLB (Moi); LLM (Southern Methodist University, USA). Odhiambo is a lawyer and consultant in the area of human rights and international development. He teaches as a part-time lecturer at the Catholic University of Eastern Africa and Presbyterian University of East Africa.

1 Y Ghai 'Kenyan Constitution: History in the making; the challenges of implementation' *Pambazuka News* available at www.pambazuka.org/en/category/features/66501 (accessed on 15 October 2010).

to be implemented systematically, the timelines set pursuant to the implementation schedule strictly observed and more importantly, the same undertaken by the organs specified in the implementation schedule. Therefore, this chapter evaluates the implementation process as detailed in Schedules Five and Six of the Constitution of Kenya (2010). It shall elucidate the fact that the success and benefits of a new constitutional dispensation lies for the most part in its implementation. Benjamin Odoki puts this into perspective by surmising that:

In order to implement the Constitution, appropriate democratic institutions must be established through which the people must exercise power directly or through their selected representatives. Democratic values and practice must be fostered amongst the population to empower them to actively participate in their own governance. Implementing a Constitution is an expensive enterprise. Therefore, adequate resources must be made available to facilitate the building of strong democratic institutions and pillars of state.²

In the words of Raila Odinga:

The task ahead now is to implement the new Constitution of Kenya by making it a living document, not a hollow script. I repeat, our first task is to implement the Constitution and not just to confine ourselves as a Parliament to the duty and obligation of enacting enabling or implementing legislation ... Implementation means that the national values and principles of governance which include integrity and transparency must be enforced now. The essential pillars of the new Constitution on which rest all the structures of governance including the representation of the people, the executive, the judiciary and devolution, are found in Chapter Four and Chapter Six of the Constitution, that is the Bill of Rights and Leadership and Integrity.³

2 B Odok 'The challenges of constitution-making and implementation in Uganda,' (2003) 15 *Constitutionalism in Africa* 281.

3 R A Odinga 'Implementation of the new Constitution of Kenya: A new Era' Prime Minister's keynote address to the Kenyan National Assembly delivered on 29 September 2010.

2 CONSTITUTION IMPLEMENTATION: A TWO-PRONG PROCESS

The first stage in constitutional implementation is the identification and setting up of the institutions and rules specified in the document. This stage may involve the repeal of laws from the statutes and the abolition of institutions that potentially would conflict with the coming into operation of the new laws and institutions envisaged therein.⁴ The second stage would require the institutions created under the law to strictly perform their mandate. This would involve contending with the strengths and weaknesses of those institutions in order to enhance accountability and create a constitutional culture. Additionally, it will be necessary for the newly created institutions to come up with benchmarks for purposes of evaluating their performance subject to the law and as part of the implementation process.⁵ This is because strong, credible and transparent institutions have the potential to birth and nurture the expectations of this country as it attempts to conform to the tenets of the new Constitution.

3 THE CONSTITUTION IMPLEMENTATION PROCESS AND ORGANS

The implementation phase ‘encompasses the executive, legislative, administrative and judicial actions that transform the constitutional text into policies, statutory laws, and institutions’ and follows the ‘approval and adoption of the new Constitution and consists of the practical translation of constitutional theory into political action.’⁶ The possibility of implementing the new text depends on the resulting distribution of power and how it influences the expectations and vested interests of the political players. The 2012 succession politics, therefore, cannot be divested from this process because the aftermath of the 2007 post-election violence played a major role in influencing the relentless search for a new Constitution in Kenya. The quest to forebear the occurrence of another wave of

4 P Burnell ‘The relationship of accountable governance and constitutional Implementation with reference to Africa’ (1998) 1 *Journal of Politics and Law* 18.

5 As above.

6 A Bonime-Blanc *Spain’s transition to democracy: The politics of constitution-making* (1987).

violence in the forthcoming 2012 General Elections has revived the determination to have proper electoral structures in place. This means that some of the vital and fundamental aspects of the new Constitution must be dealt with by way of implementation 'in order to set up the constitutional structures, electoral units, and safeguards which will help ensure a transparent, peaceful, and credible electoral process' and thus avert another public upheaval.⁷

In this regard, implementation must be safeguarded against the political wheeler dealing and horse-trading which have been the hallmark in Kenyan politics. The consequences of such vices may not only lead to political balkanisation but may also be ruinous to the letter and spirit of the new Constitution. As Vojin observes:

Even the most carefully prepared and defined constitutional arrangements, put down in impressive and coherent constitutional texts ... If there is a strong determination, accompanied with impressive rhetoric, not to observe the Constitution, and if— on the other hand— there is no determination to defend the constitutional regime and no incitement to abide by it, the whole structure can disintegrate, suddenly or gradually.⁸

The foregoing sets the stage for the examination of the implementation process and organs with respect to the new Constitution, and how they relate to the ideals that have been mentioned in the foregoing discussion. Under the Sixth Schedule⁹ of the Constitution of Kenya 2010, the two foremost institutions created for purposes of overseeing the implementation process are the Constitutional Implementation Oversight Committee (hereafter 'the Committee') and the Commission for the Implementation of the Constitution (hereafter 'the Commission'). A reasonable reading of the Sixth Schedule leaves one with a feeling of both order and

7 M Ranneberger 'Reflections on the implementation of the new Constitution' available at http://nairobi.usembassy.gov/speeches/2010-speeches/sp_20100923.html (accessed on 10 October 2010).

8 D Vojin 'Social and cultural prerequisites for promotion and implementation of the democratic control of Armed Forces' available at http://www.dcaf.ch/publications/Working_Papers/67.pdf (accessed on 10 October 2010). The author compares this to the Weimar Republic of Germany which was perverted and subsequently destroyed because of the lack of support by the strongest political classes and the bureaucracy that was supposed to sustain it and likened it to a democracy without democrats.

9 Art 262 of the Constitution of Kenya (2010).

timeliness that would result in an effective implementation of the Constitution since all the organs are listed and the timelines set for each stage of the process. It is noteworthy that the Committee is a parliamentary committee and has the mandate of overseeing the implementation of the Constitution together with working in concert with the Commission, the Attorney-General and other players in ensuring a timely and problem free process.¹⁰

3.1 PARLIAMENTARY SELECT COMMITTEE

The Sixth Schedule of the Constitution provides for the establishment of a parliamentary select Committee on the implementation of the Constitution in the following terms:

4. There shall be a select committee of the National Assembly to be known as the Constitutional Implementation Oversight Committee which shall be responsible for overseeing the implementation of this Constitution and which, among other things –

- (a) shall receive regular reports from the Commission on the Implementation of the Constitution on the implementation of this Constitution including reports concerning—
 - (i) the preparation of the legislation required by this Constitution and any challenges in that regard;
 - (ii) the process of establishing the new commissions;
 - (iii) the process of establishing the infrastructure necessary for the proper operation of each county including progress on locating offices and assemblies and establishment and transfers of staff;
 - (iv) the devolution of powers and functions to the counties under the legislation contemplated in section 15 of this Schedule; and
 - (v) any impediments to the process of implementing this Constitution;
- (b) coordinate with the Attorney-General, the Commission on the Implementation of the Constitution and relevant parliamentary committees to ensure the timely introduction and passage of the legislation required by this Constitution; and

10 As above art 4 of the Sixth Schedule.

- (c) take appropriate action on the reports including addressing any problems in the implementation of this Constitution.

3.2 COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION

The Commission comprises of nine individuals who cumulatively should have experience in the areas of public administration, human rights and government. It is saddled with the task of monitoring, facilitating and overseeing the development of legislation and administrative procedures necessary for the full implementation of the Constitution. Further, it is supposed to work with each constitutional commission to ensure that the letter and the spirit of the new Constitution are respected.¹¹ The Commission's tenure is limited to five years from the time it was established or upon full implementation of the Constitution as may be determined by parliament (whichever is earlier). The National Assembly, however, may extend the Commission's life vide a parliamentary resolution.

The implementation of the Constitution is quite a Herculean task calling for total dedication and diligence on the part of the implementing organs. The process cannot be entirely left to

11 Art 5 of the Sixth Schedule provides as follows: '5(1) There is established the Commission for the Implementation of the Constitution. (2) The Commission consists of— (a) a chairperson; and (b) eight other members. (3) The members of the Commission shall— (a) include persons with experience in public administration, human rights and government; and (b) not include any person who served as a member of the Committee of Experts appointed under the Constitution of Kenya Review Act, 2008. (4) Articles 248 to 254 apply to the Commission. (5) After the Commission on Revenue Allocation has been established, the Commission for the Implementation of the Constitution shall send a notice of its meetings to that Commission, and a member of the Commission on Revenue Allocation shall be permitted to attend and participate in any such meeting, but shall not vote. (6) The functions of the Commission shall be to— (a) monitor, facilitate and oversee the development of legislation and administrative procedures required to implement this Constitution; (b) co-ordinate with the Attorney-General and the Kenya Law Reform Commission in preparing, for tabling in Parliament, the legislation required to implement this Constitution; (c) report regularly to the Constitutional Implementation Oversight Committee on— (i) progress in the implementation of this Constitution; and (ii) any impediments to its implementation; and Work with each constitutional commission to ensure that the letter and spirit of this Constitution is respected. (7) The Commission for the Implementation of the Constitution shall stand dissolved five years after it is established or at the full implementation of this Constitution as determined by Parliament, whichever is sooner, but the National Assembly may, by resolution, extend its life.'

parliament to undertake due to its busy schedule and given the strict implementation deadlines. This reality made the drafters to pick on the Commission as the vehicular outfit to implement the Constitution.¹²

3.3 PARLIAMENTARY OVERSIGHT ROLE IN THE IMPLEMENTATION PROCESS

It cannot be gainsaid that Parliament shall play a key role in the implementation process. In this regard, all attention shall be on it as a way of ensuring that its actions are not at variance with the new law. The key role that parliament has been assigned is the enactment of a robust legislative framework that is calculated at giving impetus to the implementation process. It is quite discernible that parliament has the responsibility of ensuring that all the timelines are respected and that the necessary legislations and actions are adhered to. The benchmark upon which the actions of parliament ought to be assessed is the promotion of the culture of constitutionalism.

Constitutionalism goes beyond the mere existence of, and governance according to, a Constitution.¹³ It is premised on the assumption that the Constitution is a social contract between people and their leaders, defining democratic governance, guarantees individual rights, and empowers the citizenry to use it as a living document that reflects their needs and aspirations in furtherance of their day-to-day life struggles. The viability and success of a Constitution presupposes constitutionalism, a belief in the value of restrictions on power, and the practice of the rule of law, with the emphasis on rules and their enforcement. Paradoxically, countries like Kenya which try to use the Constitution for social transformation lack the tradition from which these ideologies spring. This situation is aggravated by a lack of knowledge of the role and content of the

12 International Commission of Jurists 'Transitions provisions of the Constitution: Committee of implementation' available at http://www.icj-kenya.org/index.php?option=com_content&task=view&id=295&Itemid=44 (accessed on 2 October 2010).

13 See W Maina 'Constitutionalism and democracy' in K Kibwana *et al* (eds.) *In search of freedom and prosperity: Constitutional reform in East Africa* (1996) 1-6.

Constitution among those who would benefit from its respect and enforcement.¹⁴ As Fatton argued:

Constitutionalism requires the regulated political unpredictability of polyarchy; a form of uncertainty contained within and structured by a predictable system of rules. Most critically, political actors have— at a minimum— to be convinced that the uncertainties of defeat do not outweigh the gains of a possible future victory.... Constitutionalism is not merely a set of constraints on majority rule, a binding limit to ‘passions’ and arbitrary power; it is also a pattern of behaviour reflecting the balance of class forces.... Power relations are thus decisive in the consolidation of constitutionalism. When popular classes erupt onto the political stage and upset the existing balance of class power, the Constitution is unlikely to prevent ruling classes from launching a coup de force.¹⁵

Parliament should thus avail itself as a forum for discussion that adds value to the implementation process with the resultant effect of promoting and deepening the benefits of constitutionalism, rule of law and democracy as enshrined in the Constitution. As an organ of government with an oversight role over the other two organs, it should ensure the grounding of accountability and transparency in the process of implementation whilst also confirming that the process conforms to the ideals of democracy.¹⁶ As such, constitutionalism, when well practiced, is bound to bring forth a culture of respecting a country’s constitutional normative and institutional frameworks and straddles both constitutional and political ethos.¹⁷ Such aspects of constitutionalism can only be achieved if parliament lives up to its core business, being consideration of legislation. It must expand all available opportunities for examining proposed laws since law making is its core business and should rightly be accorded top consideration.

14 Ghai (n 1 above).

15 R. Fatton ‘Constitutions and constitutionalism in Africa’ (1996) Paper presented at the 1996 African Studies Association Annual Meeting (San Francisco).

16 K Kindiki ‘The state of constitutionalism in East Africa for the year 2005: The role of the East African Community’ available at <http://www.kituochakatiba.co.ug/Constn%20-EAC%202005.pdf> (accessed on 14 October 2010).

17 As above 2.

Thus the parliamentary oversight committee should live up to its responsibility of scrutinising and examining in detail the specific bills that are brought to parliament for passage. The task herein shall be to ensure that there is not conflict or room for conflict between the new Constitution and the laws published and also guarding against the usurpation of the aspirations of Kenyans by anti-reformists and or opportunists. The oversight committee must be able to assess how the provisions of any bill brought to the House would potentially affect the wishes, aspirations and expectations of ordinary Kenyans. 'The reason we have parliaments is that we desire good laws; and one threshold quality of good laws is that they do not unduly, or without good reason, trespass on the rights and liberties of ordinary citizens.'¹⁸

The lingering question therefore is, if the new Constitution symbolises a genuine victory for the underprivileged and marginalised to the extent of destabilising the entrenched interests of the elites, will the latter allow the same to happen? Or in the alternative, shall the Kenyan people be in a position to maintain the resolve and determination exhibited at the referendum and proceed to confirm the same victory in its fullest sense?¹⁹ This is a question to be fully answered by the passage of time as the implementation ride takes its course.

For this to be achieved, it is important that parliamentarians are aware of the potential long-term impact of their role and actions during the implementation process both from a political, economic and social cultural standpoint, with the Kenyan populace expected as a beneficiary of this exercise. Despite the foregoing, given the various demands on its time and the strict timelines, it must not be forgotten that even the most dedicated parliament is not in a position to execute such a workload without administrative support and institutional capacity.

18 J Uhr 'keeping government honest: Preconditions of parliamentary effectiveness' address to the Western Australian Commission on Government in Perth in August 1995 (unpublished).

19 International Commission of Jurists-Kenya Section 'Constitutional change, democratic transition and the role of the judiciary in government reform: Questions and lessons for Kenya' (2010) Vol. IX *Judiciary Watch Report* 79.

4 **POLICY, INSTITUTIONAL AND ADMINISTRATIVE REFORMS: A NEEDED OUTCOME OF IMPLEMENTATION**

Ben Sihanya argues that:

Policy reforms are crucial to provide clear parameters on legislation and administrative reforms. One approach would be to enact an omnibus policy framework on the legislative, administrative and institutional architecture required for the implementation of the Constitution. This should be complemented by thematic and sectoral policies, for example, on health, security, education, gender, youth, food security, energy, transport and communication, among others. Happily, there are policy instruments in some of these fields that need just some review while in other fields there are useful draft policy papers that should be finalised.²⁰

The world is replete with examples of how new institutions face hostility from established interests and need time, public support laced with good leadership to carry out their constitutional mandates. This is because good governance can only result from constitutional reforms that are well received by the public as well as the political class. Central to this are the institutional choices that are made and their ability to positively impact the sphere of governance. Looking at the new Constitution, the number of new institutions and ideals governing them clearly reflects the belief of the drafters in the benefits and power of a robust constitutional design which essentially is calculated at improving governance. For instance, the Constitution initiates radical judicial reforms by creating a more robust Judicial Service Commission and insisting on the vetting of Judges and Magistrates who would serve in the new judiciary. It is needless to emphasise that the judiciary is the custodian of the Constitution and is mandated to affirm the protection of human rights and also ensure the demarcated boundaries between the organs of government are not overstepped. As such and for purposes of living up to its constitutional billing, the judiciary must enjoy independence from other organs of government though this was largely mythical in the former constitutional dispensation. Key points that determine judicial independence are: selection, election and dismissal of judges, training of judges and financing the judiciary.

20 Ben Sihanya 'Implementing the Constitution of Kenya 2010' (unpublished).

Increasing the level of efficiency in the judiciary calls for manifold changes in the system, including: overcoming procedural weaknesses, overhauling inappropriate organisational structures, creating alternative mechanisms for resolution of disputes and embracing a system that conforms to current trends of information technology.²¹ It is little wonder therefore that the lack of such a system has been the main cause of the lamentation over Kenya's judiciary. This situation has been worsened by the skewed nature of appointments which were bereft of transparency and therefore lacked credibility. Thus, to remedy such discrepancies, the new Constitution envisages vetting as a platform for revamping the judiciary, at least to do away with the 'rotten apples' that have for ages been the basis for the wholesale condemnation of the judiciary.²² This notwithstanding, it is vital for the vetting process to be based on clear and concise standards that are internationally recognised. Ultimately, it is important to ensure the appointment of highly qualified professionals to the judiciary as a way of restoring public confidence on the institution.

It is noteworthy that Article 173 of the Constitution establishes the Judiciary Fund, arguably to secure the independence of the judiciary. The Fund shall be used for 'administrative expenses of the judiciary and such other purposes as may be necessary for the discharge of judicial functions.'²³ For many years, insufficient and/or unpredictable funding has halted the proper functioning of the judiciary. Since a total overhaul of the judiciary is now the government's central talking point, the issue of adequate funding deserves full attention. The sum-total of the foregoing discussion will be the affirmation of the fact that:

Accomplishing judicial independence that will ensure fully impartial court decisions is a complex issue that very much influences the performance of other judicial institutions. Nevertheless, the success of the judicial reforms depends upon the level of development of the judicial and the broader political system, the readiness and

21 See Skopje 'The reform of the judicial system in the Republic of Macedonia (2005) available at <http://siteresources.worldbank.org/INTECA/Resources/Macedoniastrategija.pdf> (accessed on 10 October 2010).

22 Section 23 of the sixth schedule provides for the vetting of judges.

23 Art 173(2) of the Constitution of Kenya 2010.

the expectations, and above all, the efficiency of the institutions implementing the reform.²⁴

5 THE IMPLEMENTATION SCHEDULE

The Fifth Schedule of the Constitution provides for the following implementation timelines:

Time Specification	Task/Legislation	Article of the Constitution
2 months	Establishment of the Judicial Service Commission	Sixth Schedule, article 20(1)
3 months	Establishment of the Commission for the Implementation of the Constitution	Sixth Schedule, article 25 (1)
3months	Establishment of the Commission of Revenue Allocation	Sixth Schedule, article 25 (1)
9 months	Salaries and Remuneration Commission	Sixth Schedule article 25 (2)
1 year	Legislation on Citizenship	article 18
	Kenya National Human Rights and Equality Commission	article 59
	Ethics and Anti-corruption Commission	article 79
	Legislation on elections	article 82
	Electoral disputes	article 87
	Independent Electoral and Boundaries Commission	article 88
	Legislation on political parties	article 92
	Vacation of office of member of Parliament	article 103

24 Skopje (n 21 above).

	Power of mercy	article 133
	System of courts	article 62
	Establishment of the Supreme Court and appointment of judges	article 21 (1)
	Removal from office of judicial officers	article 168
	Vetting of judges and magistrates	Sixth Schedule, article 23
	Election of Speaker of county assembly	article 178
	Legislation on governance of urban areas and cities	article 184
	Contingencies fund	article 208
	Loan Guarantees by national government	article 213
1.5 years	Legislation on land	Article 68
	Legislation on effect of Chapter 11 - Devolved Government	article 200, Sixth Schedule, article 15
	Removal of county governor	article 181
	Vacation of office of member of county assembly	article 194
	Revenue funds for county governments	article 207
2 years	Legislation on leadership	article 80
	Right of recall	article 104
	Determination of questions of membership of parliament	article 105
	Right to petition parliament	article 119

	Assumption of office of president	article 141
	Judiciary fund	article 173
	Financial control	article 225
	National security organs	article 239
	Command of the National Police Service	article 245
3 years	Freedom of the Media	article 34
	Support for county governments	article 190
	Public participation and county assembly powers privileges and immunities	article 196
	County assembly, gender and balance diversity	article 197
4 years	Consumer Protection	article 46
	Fair administrative action	article 47
	Fair hearing	article 50
	Rights of persons detained or held in custody	article 51
	Legislation regarding environment	article 72
	Accounts and audit of public entities	article 226
	Procurement of public goods and services	article 227
	Values and principles of public service	article 232
5 years	Legislation in respect of Culture	article 11
	Family	article 45
	Community land	article 63
	Regulation of land use and property	article 66

	Agreements relating to natural resources	article 71
	Promotion of representation of marginalised groups	article 100
	Any other legislation required by the New Constitution	
	Re-organisation and restructuring of the Provincial Administration	Sixth Schedule, article 17

6 PROBABLE CHALLENGES TO THE IMPLEMENTATION PROCESS

It shall be foolhardy to undertake a discourse on the implementation of the new Constitution without highlighting some of the probable challenges and difficulties that may be encountered in the process. Indeed, it is one thing to have a flowery Constitution, but a totally different thing to implement it to the satisfaction of the general public. In Kenya, many factors will attempt to challenge or even derail the implementation process. First is the cost implication in the sense that the actual cost of implementation may easily outweigh the amount the government may be willing or able to set aside for the process. The creation of new political institutions is expensive, a factor that may lead to a possible standoff between the national government and the newly created county governments over budget allocations.

The parliamentary Committee on the Implementation of the Constitution has made it clear that the government needs to set aside not less than 4 billion Kenya shillings over the next two years, if it is to accomplish the stipulated implementation timeframes. In response, the Minister for Justice was concerned that the government had not committed any cash to the process.²⁵ At this rate, it is conceivable that without having proper budgets in place, the implementation process may stall. It is therefore important to have strong coordination

²⁵ See 'Taxpayers face new Sh4b bill for Constitution' *Daily Nation* (19 October 2010) 3.

between all three branches of government.²⁶ Whereas the legislature is busy with enacting the requisite laws, the executive should reciprocate the good gesture by providing sufficient funding.

Second, there are doubts on whether there will be a balance between a new mechanism and the old system in place and if the new system will support the old institutions as the country moves into the new order. Third, there is a feeling that there is going to be a probable surge in litigations over the bill of rights in light of the progressive nature of the rights and entitlements contained therein. Fourth, the creation of the institutions and commissions needed to give life to the Constitution if not handled with care may serve as a death knell to the process of implementation. Some of these institutions include the National Land Commission, the Kenya National Human Rights and Equality Commission and the Judicial Service Commission.

Fifthly, there are vested interests, which may seek to undermine the reform spirit, contained in the new Constitution. Already, the nomination process of commissioners to the CIC is questionable as the mode of appointment and the suitability of some commissioners has been faulted. Political gerrymandering between the parties that form the coalition government totally diluted the nomination process. Generally, politicians have come out fighting and plotting on how to secure their party interests and positions at the expense of the implementation process. Another potential hurdle to the implementation process relates to how the vetting of judges would be conducted without compromising judicial independence. It is hoped that in the quest for a competent judiciary, the principles of judicial independence, security of tenure of judicial officers and transparent procedure for appointment and removal of judicial officers shall be respected. To this end, the process of recruitment and vetting of the judges must be transparent and devoid of any malpractices that may hamper the ideals espoused in Chapter 10 of the Constitution.

26 V Petrovic-Skero 'Judicial reform in the Republic of Serbia' available at http://judicialmonitor.org/archive_1206/globaljudicialdialogue.html (accessed on 9 October 2010).

Seventh, there is the real risk that in the rush to enact new Acts of Parliament, inadequate thought may result in shoddy and poorly drafted laws. Since legislation is subsidiary to the new Constitution, poor draftsmanship will most likely lead to endless litigation bordering on the constitutionality of conflicting provisions. Eighth, it is doubtful that Parliament has the capacity to pass all the requisite laws within the designated timeframes. Parliament is expected to offer leadership in the process. Moreover, Parliament shall play a key role in setting up institutions including new commissions that must be put in place before some of the provisions of the new Constitution can be implemented.

Ninth, the activities of the political parties among other things may create challenges in this direction. The difference in the basic philosophies, ideologies or interests of the political parties on the implementation process may complicate issues. There is a need for greater political will and commitment from the leaders of the political parties. The political leadership should be strong, accountable and people-centered.

7 MONITORING THE IMPLEMENTATION PROCESS: THE PLAYERS

7.1 CIVIL SOCIETY

Civil society in particular should seize this goodwill for reforms and propose guidelines for implementing the new Constitution's principles of justice, equity, human rights and integrity guaranteed in public administration.

7.2 INTERNATIONAL COMMUNITY

The international community must also continue to ensure that the leaders never lose focus on the implementation of the Constitution, which they could easily do if that proves expedient to their political interests.

7.3 GENERAL PUBLIC/KENYANS

It is incumbent upon Kenyans to diligently follow up on the implementation process and schedule. This is primarily because the country's citizens played a pivotal role in the enactment of the Constitution. It is on the basis of this recognition that the Constitution proclaims sovereignty of the people in its first Article. Thus, Kenyans should be active in ensuring that the Constitution is fully implemented. To this end, they must fight impunity, corruption, ethnicity and any other social ill or strategy that may probably distract them from the noble task of implementing the Constitution. As Yash Pal Ghai says:

They must hold onto the vision of a Kenya that they helped to shape, in numerous meetings and submissions over the years— of a democratic and caring society, based on inclusion and social justice, fundamental human rights, respect for cultural differences but united in our search for harmony and unity, and the common commitment to the worth and dignity of us all.²⁷

It is needless to emphasise that Kenya has experienced decades of poor governance epitomised by utter disregard for human rights and fundamental freedoms. This culture may not end abruptly merely because a new Constitution has been promulgated. Instead, the political elite may want to continue the culture of impunity intentionally to defeat the objects and purposes of the new Constitution. These 'anti-reformists' may devise various ways and tactics to defeat the full and proper implementation of the Constitution. For example, they may seek to appoint to key positions people who are sympathetic to their ideologies or plight. They may also resort to corruption, bribery and other forms of inducements in order to tamper with the process. Hence, Kenyans ought to be wary of any concerted efforts to subvert and undermine the impact and reach of the new Constitution. In the words of Mathenge:

Kenyans must keep their eyes on the ball lest reactionary forces hijack and abort the dream for a national renewal. This is informed by painful experiences of many false starts and failed expectations since

²⁷ Ghai (n 1 above).

independence ... reactionary forces have stalked the reform process at every turn.²⁸

8 CONCLUSION

It is clear that the Constitution of Kenya 2010 sets the stage for a complete overhaul of Kenya. It is therefore important that the Constitution be implemented in the manner that ultimately fosters constitutionalism. This process of implementation must be inclusive and broad-based, at least from the perspective of the Kenyan populace, and must guarantee the ideals of good governance and be reformative in nature. New laws or the existing ones must also conform to the tenets and values of the Constitution. Further, the new institutions envisaged in the document must be supported to capacitate their effectiveness in enhancing accountability and transparency in governance. It is equally important that the implementation process be guided by the national principles and values that include equity, social justice, inclusiveness, equality and human rights.

28 G Mathenge 'Why we must learn from past experiences' *Sunday Standard* 29 August 2010, 39.

CONCLUSION

Kenya has had a chequered constitutional history which witnessed atrocious and eclectic amendments of the independence constitution the effect of which was to dismember and distort the Constitution. The numerous, uncoordinated and politically expedient changes only undermined democracy, Constitutionalism, the Rule of Law leading to clamour for change which ultimately ended on the 27th day of August, 2010 when a new Constitution was promulgated after nearly twenty years of agitation.

The 'new' Constitution opens new vistas in what is potentially a Constitutional revolution of unprecedented proportions in the key areas of Bill of Rights, Land Rights, Representation, Devolution and a myriad of other areas.

Throughout this book the authors have dealt with diverse issues. While they have applauded the 'dramatic' changes in the Constitutional text they underscore the significance of matching constitutional practice and constitutional provisions to give meaning to democracy and the Rule of Law.

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PLO LUMUMBA
M. K. MBONDENYI
S. O. ODERO

THE CONSTITUTION OF KENYA

CONTEMPORARY READINGS

The Constitution of Kenya: Contemporary Readings, provides an in-depth assessment of the interface between constitutionalism and Kenya's new Constitution. Focusing on the historical trajectory on the search for a new Constitution, Chapter One lays the groundwork upon which the fault line between constitutionalism and the issue areas are articulated in the other chapters in relation to the new Constitution. The superb chapters on the carefully selected issue areas, make this edited volume an essential reading. The book makes an important contribution to the evolving constitutionalism and policy clarification on Kenya's new Constitution. It is a welcome and timely intervention by legal scholars and practitioners on the new constitution and the challenges facing Kenya in its implementation. The book is an excellent teaching and reading manual for students in law, history, politics, diplomacy, and international relations as well as for the practitioners.

Korwa Gombe Adar is Professor of International Relations, United States International University, Nairobi, Kenya and Council Member, Chepkoiel University College, Eldoret, Kenya.

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